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No. 95-1849

In The

Supreme Court of the United States

October Term, 1995

PIC-A-STATE PA, INC. and SCOTT McLEAN,

Petitioners,

vs.

JANET RENO, in her official capacity as Attorney General of the United States of America; THE UNITED STATES DEPARTMENT OF JUSTICE; and THE UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. FINIO
Counsel of Record
WILLIAM M. JANSSEN
SAUL, EWING, REMICK & SAUL
240 North Third Street
Suite 700
Harrisburg, Pennsylvania 17101
(717) 257-7500

Attorneys for Petitioners

8846
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Does the commerce power include a "trump card" (a general federal police power) which empowers Congress to remedy and consent to violations of the dormant Commerce Clause with immunity from meaningful judicial review?

2. Does Congress have unlimited power to expand a State's police power beyond that which the dormant Commerce Clause permits, when such an expansion would exclude an activity from interstate commerce, and when the ends of such activity, even *after* Congress acts, can still be accomplished by other constitutionally protected means?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in this Court remain the same as they were in the United States Court of Appeals for the Third Circuit ("Third Circuit").

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Relying evidently upon its commerce authority, Congress in 1994 exercised a general federal police power — a power it does not possess — to make illegal a courier service that assists people in lottery States in playing the official, lawful, and government-sponsored lotteries of other lottery States. The Third Circuit refused to invalidate this congressional overreaching. This petition seeks review of that refusal.

OPINIONS BELOW

The opinion and judgment of the Third Circuit Court (Pet. App. A & B at 1a-24a) subject to review is *Pic-A-State PA, Inc. v. Reno*, reported at 76 F.3d 1294 (3d Cir. 1996) ("*Pic-A-State II*"). This opinion was the culmination of other, directly related proceedings that must be catalogued to provide context to this petition.

In 1993, Pennsylvania made it a *state* crime to take orders from people who wished to play another State's official lottery. Petitioners filed a dormant Commerce Clause challenge to this new state crime, and the statute was struck down by the United States District Court for the Middle District of Pennsylvania ("Middle District"). *Pic-A-State PA, Inc. v. Pennsylvania*, No. 1:CV-93-0814, 1993 WL 325539 (M.D. Pa. July 23, 1993) ("*Pic-A-State District I*"). The district court's unreported opinion is reprinted in Petitioners' Appendix C at 25a-45a. On appeal, the Third Circuit ultimately reversed, citing an intervening change in federal law as the justification. *Pic-A-State PA, Inc. v. Pennsylvania*, 42 F.3d 175 (3d Cir. 1994) ("*Pic-A-State I*"). A copy of *Pic-A-State I* is attached in Petitioners' Appendix D at 46a-58a. This new federal law is the one at issue in this petition. It created a *federal* crime making it illegal to transmit information in interstate commerce for the purpose of helping someone in a lottery State play another lottery State's official games.

This new law was signed on September 13, 1994; *Pic-A-State I* was argued a day later, on September 14, 1994. Two days

after argument on the State law case, Petitioners filed this challenge to the new federal law in the Middle District on September 16, 1994. The Middle District enjoined enforcement of the new federal law pending final adjudication, and ultimately upheld the law in February 1995 and denied a stay pending appeal in March 1995. *Pic-A-State PA, Inc. v. Reno*, No. 1:CV-94-1490, slip op. (M.D. Pa. Feb. 23, 1995) ("*Pic-A-State District II*"). The Middle District's second opinion is also unreported but is set forth in Petitioners' Appendix E at 59a-71a. Petitioners appealed this decision to the Third Circuit, which affirmed in the opinion at issue here, reported at 76 F.3d 1294 ("*Pic-A-State II*").

STATEMENT OF JURISDICTION

The final judgment of the Third Circuit was entered on February 13, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). This petition is timely filed. U.S. S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Prior to the 1994 Amendment at issue here, 18 U.S.C. § 1301, "Importing or transporting lottery tickets," provided:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or

> chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1301 (1988) (amended 1994).

The Interstate Wagering Amendment, signed on September 13, 1994, amended 18 U.S.C. § 1301 by *adding the following language*:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; *or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted by an agreement between the*

> *States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest;* or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited or transported, shall be fined *under this title* or imprisoned not more than two years, or both.

Violent Crime & Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XXXII, § 320905, 1994 U.S.C.C.A.N. (108 Stat.) 2126 (codified at 18 U.S.C. § 1301 (as amended)).

Section 3761-9(c) of the Pennsylvania State Lottery law provides:

> (c) Except as provided in this act, no person shall engage in the sale or offering for sale within this Commonwealth of any interest in a lottery of another state or government whether or not such interest is an actual lottery ticket, receipt, contingent promise to pay, order to purchase or other record of such interest.

Pa. Stat. Ann. tit. 72, § 3761-9(c) (as amended) (1993).

United States Constitution, Art. I, § 8, cl. 3 provides:

> The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

There are no disputed facts. Pennsylvania has conducted a State lottery since 1971. *See* Pa. Stat. Ann. tit. 72, §§ 3761-1 to-15. Buying Pennsylvania lottery tickets from licensed agents is legal in Pennsylvania. *See id.* § 3761-11. By traveling on their own, Pennsylvanians may also go and buy the legal lottery tickets offered by other States, and non-Pennsylvanians can come to the Commonwealth to buy Pennsylvania lottery tickets.[1]

Pic-A-State's business enabled anyone to play another State's lottery by hiring Pic-A-State to save them the trip.[2] Pic-A-State's retail outlets take orders and record those orders on computers which generate receipts for the customers. These receipts advise customers that they are giving Pic-A-State and its agents powers-of-attorney to act as the customers' agents in purchasing lottery tickets in other States.

Order information is sent electronically to Pic-A-State purchasing agents in the State where the customer's desired lottery is conducted. Purchasing agents take the orders to licensed State lottery agents and purchase the lottery tickets in accordance with that State's law. After the tickets are purchased, the Pic-A-State agents do not return the tickets to the customer; the tickets are kept in the State of purchase where they are available to the purchasing customers. Thus, for a one dollar fee,

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1. This case arose in Pennsylvania, and this petition discusses this challenge in a Pennsylvania context. Ultimately, however, the comments stated are true concerning the ability to play lotteries in other States which sponsor lotteries: out-of-State residents are not, as a class, prohibited from buying another State's lottery tickets.

2. Pic-A-State stopped operating virtually contemporaneously with the Middle District's decision in *Pic-A-State District II*.

plus the dollar cost of the ticket, a Pennsylvanian had an easy way to play, for example, the Texas lottery.

Pic-A-State does *not* sell or re-sell lottery tickets. Rather, Pic-A-State purchases only those tickets its customers specifically order. Pic-A-State does not run a gambling operation; it only buys legal lottery tickets offered for public sale by other States. Instead, Pic-A-State's service conveniently and inexpensively obtains something its customers could lawfully purchase for themselves by exercising their constitutional right to travel. The only interstate aspect of this transaction is the electronic transmission of the customer order information, from one lottery State to another lottery State.[3]

Pennsylvania not only opposed Pic-A-State's business, but went to great lengths to shut it down. In 1991, Pennsylvania attempted to enjoin Pic-A-State's activities in State court under existing Pennsylvania and Federal statutes. The Pennsylvania Commonwealth Court heard and rejected Pennsylvania's motion for preliminary injunction in that case, finding no violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann. tit. 73, § 201-2(4); existing Pennsylvania lottery and anti-gambling laws, Pa. Stat. Ann. tit. 73, § 3761-9 & Pa. Stat. Ann. tit. 73, §§ 5512-14; or the federal Interstate Transportation of Wagering Paraphernalia provision, 18 U.S.C. § 1953. *Commonwealth v. Goen*, No. 218 M.D. 1991, slip op. (Pa. Commw. Ct. Aug. 19, 1991) (Craig, P.J.) (Not-To-Be-Reported Adjudication) (Pet. App. F at 72a-86a). The Pennsylvania Supreme Court affirmed this decision without opinion on May 6, 1992. *Commonwealth v. Goen*, 531 Pa. 329, 612 A.2d 1353 (1992) (Pet. App. G at 87a-88a). The Commonwealth took no further action on the merits in that case.

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3. The factual basis of Pic-A-State's action is set forth in the Complaint for preliminary and permanent injunction and declaratory relief that was filed in the Middle District on September 16, 1994. (*See* Complaint in Pet. App. H at 89a-104a).

Having lost in State court under existing law, Pennsylvania abandoned the courts and turned to its legislature for help. The Pennsylvania General Assembly passed a law which purported to make Pic-A-State's courier service criminal. *See* Act of May 20, 1993, No. 1993-8, 1993 Pa. Laws 27 (codified at Pa. Stat. Ann. tit. 72, § 3761-9) (as amended).[4] Pic-A-State challenged the law in the Middle District on June 1, 1993; in *Pic-A-State District I*, Chief Judge Sylvia H. Rambo reviewed existing federal anti-gambling statutes, and concluded that Pic-A-State's courier service violated none of them. *Pic-A-State District I*, 1993 WL 325539, at *3-*4 (testing Pic-A-State against 18 U.S.C. §§ 1084, 1301, 1953). Finding no violation of federal law, Chief Judge Rambo ruled that Act 8 clearly discriminated against interstate commerce in violation of the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, reasoning:

> Pennsylvania citizens can purchase tickets to, or bet in, the legally authorized Pennsylvania lottery but, under the provisions of Act 8, they cannot do the same with any other legally authorized state lotteries unless they personally travel to their sites.

Pic-A-State District I, 1993 WL 325539, at *6. Applying heightened scrutiny, Chief Judge Rambo held that Pennsylvania could achieve its objectives through other, non-discriminatory regulation. *Id.* at *7. Accordingly, Act 8 was found to violate the dormant Commerce Clause. Pennsylvania sought reconsideration, which was denied, and the Commonwealth appealed to the Third Circuit.

Meanwhile, having been turned back by both its own and the federal courts, Pennsylvania charted yet another new course, and

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4. The relevant portion of the Pennsylvania Amendment is set forth under "Constitutional and Statutory Provisions Involved."

orchestrated a quiet lobbying effort[5] in Congress to persuade Senators Arlen Specter (R-Pa.) and Harris Wofford (D-Pa.) to introduce an amendment to the then-pending federal "Crime Bill". *See* Violent Crime Control & Law Enforcement Act of 1994 ("Crime Bill"), Pub. L. No. 103-322, tit. XXXII, § 320905, 1994 U.S.C.C.A.N. (108 Stat.) 2126 (codified at 18 U.S.C. § 1301 (as amended)). This proposal, the "Interstate Wagering Amendment," changed 18 U.S.C. § 1301[6] to make Pic-A-State's business illegal. The Interstate Wagering Amendment sparked virtually no discussion in the Senate. *See* 139 Cong. Rec. 515246-48 (daily ed. Nov. 8, 1993) (Pet. App. J at 113a-125a). There were no hearings, investigations, or specific congressional findings. The amendment ultimately survived the legislative process without further comment or change. It became law on September 13, 1994, in a grand ceremony on the White House lawn touting passage of a landmark legislative effort in the war on crime.

The very next day, the Third Circuit heard oral argument in the *Pic-A-State District I* challenge to Act 8. Both during argument and in supplemental briefing, the Third Circuit sought counsel's views on the "effect" of the Interstate Wagering

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5. In *International Gaming & Wagering Business*, Vol. 14, No. 12 (Dec. 15, 1993) (Pet. App. I at 105a-110a), it was reported that Pennsylvania had garnered the support of the National Association of State & Provincial Lotteries ("NASPL") in this lobbying effort, and that "[p]erhaps NASPL's biggest accomplishment in the whole process was its aid in keeping the amendment *very, very* quiet."; NASPL Executive Director William Bergman was quoted: "Basically, we did not want Pic-A-State to know about it until the *U.S. Marshall was knocking on their door to serve them papers.*" (Pet. App. I at 107a) (emphasis added). As a result of his successful effort attacking the Pennsylvania law, Scott McLean, President of Pic-A-State, was compared in that newsletter to the Serbian anarchist who fired the shot that killed the Archduke of Austria in 1914, setting off the global conflagration that became World War I. (Pet. App. I at 108a).

6. The Interstate Wagering Amendment to the lottery law is set forth under "Constitutional and Statutory Provisions Involved."

Amendment on the pending appeal. In resolving the appeal (and over Pic-A-State's objection that to do so would be "manifestly unjust"), the Court ruled that the passage of the Interstate Wagering Amendment was dispositive: on November 30, 1994, the Third Circuit reversed *Pic-A-State District I*, explaining "that since the [Crime Bill] . . . makes the conduct of a business that sells an interest in another State's lottery a federal crime, Act 8 does not impose an unconstitutional burden on interstate commerce." *Pic-A-State I*, 42 F.3d at 176. The Third Circuit's *Pic-A-State I* decision did not review the constitutional issues raised here; the law was presumed constitutional for purposes of that appeal.

While awaiting the Third Circuit's ruling in the Act 8 case, Pic-A-State filed this challenge to the new, intervening federal legislation. The Interstate Wagering Amendment remained unenforceable until the Middle District ruled it constitutional in February 1995 and denied a stay pending appeal in March 1995. In *Pic-A-State District II*, the Middle District concluded that its examination of Congress' ability to forbid Pic-A-State's courier service was controlled by higher precedent which it could not revisit. Failing to obtain a stay pending appeal, Pic-A-State wound down its business and stopped operating. Petitioners appealed to the Third Circuit which affirmed in the judgment and opinion under review here, *Pic-A-State II*.

The Third Circuit held that "[b]ecause the Amendment regulates an activity affecting interstate commerce and rationally relates to the goals articulated by Congress, we hold the Amendment was a constitutional exercise of Congress' power to legislate under the Commerce Clause." *Id.* at 1294. The Third Circuit, relying upon this Court's decision in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), held that the Commerce Clause effectively places *no limitations* on Congress' affirmative power to legislate, other than that the regulated activity must affect commerce. In essence, the Third Circuit

concluded that since the Amendment rationally related to the goal of protecting State lottery revenues and controlling interstate gambling, the act was a constitutional exercise of Congress' power to legislate under the Commerce Clause. The Third Circuit held that Congress had the authority to enact the Interstate Wagering Amendment, even though the Amendment enables a State lottery to discriminate against out-of-State lottery tickets. Petitioners submit that in reaching that conclusion, the Third Circuit failed to analyze in any meaningful way just how the commerce power was exercised here. Upon a careful inquiry, the Interstate Wagering Amendment is constitutionally defective because, in enacting it, Congress commandeered a broad federal police power — an authority which simply does not exist under the Commerce Clause.

REASONS FOR GRANTING THE WRIT

I. THE WRIT IS NECESSARY TO REIGN IN CONGRESS' CONTINUING EFFORT TO CREATE A GENERAL FEDERAL POLICE POWER.

The Constitution specifically grants Congress the power to regulate commerce. But, as reiterated in *United States v. Lopez*, __ U.S. __, 115 S. Ct. 1624 (1995), this power has limits, and those limits are the Court's to discern. *Cf. Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S. Ct. 1114 (1996) (holding that Indian Commerce Clause does not grant Congress the power to subject a State to the jurisdiction of a federal court). Lately, Congress has been all too frequently inclined to use the commerce power to intimate the existence of a general federal police power. *Lopez* confirms that this power is not so sacred that it is, simply upon legislative invocation, immune from meaningful judicial scrutiny.

Arising from simple facts and concerning an everyday activity, this case invites the Court to yet again play its hand in

refining those constitutional principles necessary to constrain Congress' growing tendency to address matters of local concern with a broad and inappropriate national brush. Reviewing a law which inhibits a person's ability to play any *legal* lottery she wishes may seem not to implicate foundational constitutional questions, but indeed, it does.

A. This case seeks the Court to square the tension among the commerce power, the existence of a general federal police power, and the important principles reiterated in *United States v. Lopez*.

Among the express powers of Congress is the authority set forth in Art. I, Sec. 8, "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. This express power is bounded only by the document which grants the power itself. "Congress exercises its conferred powers subject to the limitations contained in the Constitution." *New York v. United States*, 505 U.S. 144, 156 (1992). While for the last six decades the Court tended not to question Congress' self-determined definition of these limits, *Lopez* changed that course.

Lopez made it clear that the Court still perceives limits on Congress' power under the Commerce Clause. While this case may not present a strict "*Lopez* question" (because the activities here have an interstate component), *Lopez* bears strong influence because it highlights an outer limit that is not nearly as dynamic as what Congress continues to exercise as a broad, unchecked power. *Lopez* illuminated the boundaries and the Court, as the beacon, must earnestly patrol the borders to prevent Congress' unbridled efforts to convert the commerce authority into a general federal police power. Such a conversion into a general federal police power eviscerates the boundaries of local and national concern and interest.

Lopez emphasized the warning given in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the Court wrote that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace affects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between *what is national and what is local* and create a completely centralized government." *Id.* at 37 (emphasis added). The Interstate Wagering Amendment is just such an obliteration.

Most critically, *Lopez* also clearly reaffirmed the federal courts' historic right of judicial review. *Lopez* marks a watershed, recognizing as it does the Court's unwillingness to merely assume Congress' constitutional authority to legislate, and reaffirming the notion that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 115 S. Ct. at 1633. *Cf.* at 1634 ("Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action."). The Interstate Wagering Amendment calls on the Court to fulfill the full promise of judicial review reiterated in *Lopez*. If Congress' use of a general federal police power lies within the scope of judicial review in light of *Lopez*, then it is time for the Court to say so directly; if it is not, then this Court should also say so. In either case, review by this Court is appropriate.

B. The Third Circuit endorsed the use of a general federal police power and ignored the important principles enunciated by this Court in *Lopez*.

The Third Circuit concluded that the Commerce Clause places *no meaningful limitation* on Congress' affirmative power to legislate, other than that the regulated activity must *affect*

commerce. *Pic-A-State II*, 76 F.3d at 1303-04. The Third Circuit ignored the important *Lopez* principle that Congress can only regulate activities that have a *substantial affect* on interstate commerce. *Lopez*, 115 S. Ct. at 1629-30 (citations omitted) ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce"). Instead, the Third Circuit stated summarily that the Congressional "findings" are rational and concluded — without pointing to any convincing support in legislative history or case law — that those "findings" arose both from national concerns and from within the acceptable confines of the commerce power.

The decision endorsed Congress' purported "national interest" in legal State-sponsored lotteries, in essence granting Congress a general federal police power over the Nation. This is significant for two reasons. First, it points out the danger of granting Congress unlimited federal police powers. Justice Thomas, in his concurring opinion in *Lopez*, was keenly aware of the potential for abuse in cases such as this, observing cogently that: "When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words." *Lopez*, 115 S. Ct. at 1649 (Thomas, J., concurring). By failing to recognize any meaningful limitations on the nature of federal commerce power, the Third Circuit has formulated a view of the Constitution that mistakenly recognizes no limits or boundaries on the federal police power. *Id.* at 1651 (Thomas, J., concurring) ("Such a formulation of federal power is no test at all: it is a blank check."). Permitting Congress to proclaim definitively the extent of its own power violates the principle of judicial review set forth in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The Third Circuit's opinion is blind to the real meaning of *Lopez*: there simply is not, and has never been, any general federal police power of the type exercised by Congress here.

This Court should make clear the maxim that Congress may not use the Commerce Clause to create one. This Court should grant this Writ to establish the guidelines necessary to evaluate the precise outer boundaries of the federal police power. Without such boundaries, the Court's historic obligation of judicial review is meaningless and Congress is elevated to a constitutional pedestal which it was never intended to occupy. If the Court meant what it said in *Lopez*, it must force Congress to step down.

Second, in failing to see that the limit was exceeded by the law, the Third Circuit failed to understand the significance in Commerce Clause review between what is national and what is local. In legislating for the national interest, Congress enjoys only "an affirmative power commensurate with the national needs." *North American Co. v. SEC*, 327 U.S. 686, 705 (1946). These *national needs* limit Congress' proper role to "the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from a State of origin." *Brooks v. United States*, 267 U.S. 432, 436 (1925). Thus, "[o]nce it is established that the evil concerns or affects commerce in more States than one, Congress may act." *North American Co.*, 327 U.S. at 706.

The critical component to this power to exclude is the presence of an "evil" which requires Congress to set a national norm. Given this Court's prior decisions in *Lopez* and *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the activity being addressed here simply presents no subject for proper Congressional lawmaking, because, as *Edge Broadcasting* makes clear, the federal interest in State-sponsored lotteries is concededly derivative. To the extent State policy goals are legitimate, Congress can act to supplement them. Here, the State policy goals were illegitimate (Act 8), and Congress cannot legitimize them *a fortiori*. There is no definable

national interest in the legal play of State lotteries through non-criminal methods.

When Congress invokes the commerce power to forbid or exclude, it must act with a legitimate purpose — a proper goal — if it wishes to regulate *past* the rights of its citizens. The Court in *Hoke v. United States*, 227 U.S. 308 (1913), illustrated the point well. There, the Court held that Congress did not invade States' rights by outlawing the interstate movement of women for "the purpose of prostitution or debauchery, or for any other immoral purpose." *Id.* at 317-18. The Court explained:

> It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility for their wrongs it may be forbidden to them. . . .

Id. at 323. The Court recognized that if Congress decides that a "wrong" truly exists, then the "right" to exploit the wrong can be proscribed by declaring either the article of commerce or the commerce itself to be "outlaws". *Hippolite Egg Co. v. United States*, 220 U.S. 45, 57-58 (1911) ("[W]e are dealing, it must be remembered, with illicit articles, — articles which the law seeks to keep out of commerce because they are debased").

To be sure, this Court may not disturb Congress' exercise of the commerce power when an evil lurks, must be eradicated, and literally requires Congress' intervention. However, congressional action that exceeds these limitations, as it did here, becomes mere "pretext", *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 423 (1819); or "verbal cellophane," *United States v. Kahriger*, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting), *overruled in part*, *Marchetti v. United States*, 390 U.S. 39 (1968). These limitations on the commerce power make sense because:

> All laws affect commerce in one way or

> another. . . . [H]owever, Congress was granted no power to regulate "whatever affects" the movement of people or the goods across State lines — doubtless in ready recognition of what such a "wholly fanciful" grant of power would have implied. . . . [T]o construe any power as though it were this one, is a facetious judicial act. * * * What is not sensible . . . is to read [the Commerce Clause] as a power that provides: "Congress shall have power to embargo the movement of goods and services from state to state to effectuate whatever polices as it likes and according such terms as it decrees."

William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 Duke L.J. 769, 782 & 787-88 (1987) [hereinafter "*Cellophane Sea*"].

The Interstate Wagering Amendment rests squarely on this discredited "whatever-effects" premise, and this flies in the face of the "national-needs" premise such lawmaking clearly must have. Worse still, Congress does not automatically have the "authority to intervene and set a national norm," *Cellophane Sea*, at 782-83; there must be "a national commercial problem of the first magnitude," *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964). Deciding whether these conditions are met, "is ultimately a *judicial* rather than a legislative action, and can be settled finally only by this Court." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring) (emphasis added). The Interstate Wagering Amendment solves no national problems. It merely protects sovereign/governmental proprietary interests that those entities cannot protect through the exercise of their own police powers, without offending the Constitution.

Any lingering doubt over whether the judiciary owes a blind deference to congressional action is dispelled by *Lopez*. *Lopez* clearly authorizes and confirms the judicial role in determining whether Congress has exceeded its enumerated powers. *See id.* at 1632 ("If we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate"). The Interstate Wagering Amendment is a congressional trespass beyond the scope of the Commerce Clause. In the context of legal, State-sponsored lotteries, the lottery landscape no longer invites such use of the commerce power.

Congress has no power to inhibit a person's ability to conveniently participate in an out-of-State lottery. If this power exists, Congress must then enjoy the power to "trump" virtually every decision of this Court in which a State law is struck down under the dormant Commerce Clause. Such a result — unprecedented — should not have as its first iteration here, because the iterations that will soon follow from a Congress run amuck are ominous indeed.[7]

II. TIMES HAVE CHANGED, BUT *CHAMPION V. AMES (THE LOTTERY CASE)* STILL MAKES IT CLEAR THAT CONGRESS HAS OVERSTEPPED ITS BOUNDS.

In refusing to declare the Interstate Wagering Amendment unconstitutional, the Third Circuit Court of Appeals relied upon the Supreme Court's opinion in *Champion v. Ames*, (*The Lottery Case*), 188 U.S. 321 (1903). *The Lottery Case* confronted a defendant's conspiracy to carry *illegal* lottery tickets (not present here) between States, apparently for the purpose of reselling them (also not present here). The defendant was

7. If the Interstate Wagering Amendment is constitutional, wouldn't Congress also be licensed to ban, at one State's instance, airplane departures and bus excursions from within that State in order to assist that State in preventing its citizens from travelling to a neighboring jurisdiction to gamble?

prosecuted under a federal anti-lottery law, regulating what the Court declared to be "a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation." *Id.* at 358.

The Lottery Case stands for the narrow proposition that Congress could (at least in the late 19th Century) rationally forbid the interstate operation of lotteries in an effort to assist the States in their own efforts to protect people from *all* lotteries and their attendant evils. This narrow proposition is irrelevant here; given the widespread *prevalence* of *State* lotteries, any sense of "evil" associated with *State-sponsored* lotteries has disappeared (at least in lottery States), and Pic-A-State's business does nothing to resurrect it. Pic-A-State does not set any betting line, does not accept any wagers, does not distribute any risk, and does not award any prizes. *See FCC v. American Broadcasting Co.*, 347 U.S. 284, 290 (1954) (commenting that the three essentials of a lottery are: "(1) the distribution of prizes; (2) according to chance; (3) for a consideration").

This Court in *The Lottery Case* had *no* occasion to consider, and certainly did *not* decide, whether a courier service hired in one lottery State to purchase lottery tickets issued by the authorized representative of another State's government-sponsored lottery may be criminalized by Congress. Because State-sanctioned lotteries are no longer viewed as morally repugnant in the great majority of States that sponsor them, it makes no sense to preclude the desire to play these games by making criminal *one* available method. The games can be played by any citizen inclined to get in his car and drive across a State line or to call his sister in New York and ask her to buy him a ticket for the next "Megabucks" drawing.

The Lottery Case also cannot be read broadly to recognize

an *absolute* congressional power to exclude anything, no matter what its nature, from interstate commerce. In fact, the Court in *The Lottery Case* confirmed the limited reach of its holding: "We decide nothing more in the present case than that . . . Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — . . . may prohibit the carriage of [lottery] tickets from state to state." *Id.* at 363. *Cf. id.* at 374 (Fuller, C.J., dissenting) ("Nobody would pretend that persons could be kept off the trains because they were going from one state to another to engage in the lottery business.").

Moreover, the legislative rationale that underpins *The Lottery Case* — the moral "evil" and "appalling character" of lotteries — is clearly inapplicable here. State lotteries are legal gambling. While "it will not be said to be a part of anyone's liberty . . . that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals," *id.* at 357, this century-old principle holds no water in today's State-sponsored lottery marketplace. Pic-A-State introduces nothing "confessedly injurious" to the market. The conduct prohibited is conduct that already exists.

The jurisprudential foundation of *The Lottery Case* has crumbled in the context of State-sponsored lotteries, and with it, the constitutional scaffolding supporting the Interstate Wagering Amendment. Any argument that the State-run lotteries are "confessedly injurious," "immoral," or "appalling" in character is hypercritical, duplicitous, and a disingenuous form of government chicanery. This Court's ancient moral judgment cannot defend Congress' overreaching use of the commerce power to exclude Pic-A-State from assisting people's desires to play the legal lotteries run by other States, because those State-run lotteries are not, by definition, "injurious," "immoral," or "appalling" in character. As Justice Stevens recently observed, reliance on federal and State efforts in the 19th Century to limit lotteries:

> ignores the fact that today hostility to State-run lotteries is the exception rather than the norm. Thirty-four states and the District of Columbia now sponsor a lottery. Three more states will initiate lotteries this year [1993]. Of the remaining 13 states, at least 5 states have recently considered, or are currently considering establishing a lottery. . . . According to one estimate, by the end of this decade all but two states (Utah and Nevada) will have state run lotteries. . . . The Federal Government and the States simply do not have an overriding or "substantial" interest in seeking to discourage what virtually the entire country is embracing. . . .

Edge Broadcasting Co., 113 S. Ct. at 2710-11 (Stevens, J., dissenting).

This Court has recognized the relevance, for the purposes of Commerce Clause analysis, of changes in national demographics, economic, and commercial circumstances. In *Heart of Atlanta Motel, Inc.*, the Court wrote that its late 19th Century Commerce Clause decisions were "not necessarily dispositive of the same question today," explaining:

> Our populace had not yet reached its present mobility, nor were facilities, goods and services circulating in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) . . . the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce.

Heart of Atlanta Motel, Inc., 379 U.S. at 251.

Identical logic compels this Court to limit *The Lottery Case* to its 19th Century facts and circumstances. The decision in *Heart of Atlanta Motel, Inc.* licenses the Court to do so, and *Lopez* condones such judicial intervention. If this Court decides to test the Interstate Wagering Amendment's constitutionality today, it need not blindly abdicate its responsibility to assess the law by incanting the antediluvian judgment in *The Lottery Case* as controlling precedent. Instead, this Court is confronted with facts plainly not present one hundred years ago — namely, that the States themselves (those whom Congress had protected with interstate prohibitions) have revised their "moral" judgments and reset their moral compasses to determine that at least their own State-sponsored lotteries are no longer "evil". This critical change in circumstances presents a new case, one not passed upon by this Court, and one which entitles, and indeed requires (particularly in light of *Lopez*), this Court to reinforce the judicial boundaries on Congress' exercise of its commerce power.

III. IN UPHOLDING THE CONSTITUTIONALITY OF THE INTERSTATE WAGERING AMENDMENT, THE THIRD CIRCUIT MADE AN UNTENABLE APPLICATION OF THE CONGRESSIONAL CONSENT DOCTRINE FOUND IN *PRUDENTIAL INSURANCE CO. v. BENJAMIN*.

Perhaps the most compelling (and to some, most offensive) aspect of this case is the *process* that ultimately led Congress to enact the Interstate Wagering Amendment. In 1991, Pennsylvania tried to put Pic-A-State out of business under existing Pennsylvania and federal statutes. Pennsylvania courts rejected the charge. Pennsylvania turned to its legislature for

help. A new State crime was created. Pic-A-State challenged and defeated it. Pennsylvania then went to Congress. A new federal law was passed. The Third Circuit ruled that this lawmaking ended the dispute. In doing so, the Third Circuit implicitly condoned, without any meaningful review, Congress' exercise of the great weight of the commerce power to create a crime. Is Congress vested with such a super-Constitutional trump card, impervious to judicial inspection? Can the great weight of the legislative process so summarily squash a commercial activity? Do any limitations apply?

The Third Circuit concluded there are no effective limitations, relying on *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), and *Northeast Bancorp. Inc. v. Board of Governors*, 472 U.S. 159 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause"). In *Prudential*, South Carolina had imposed a gross receipts tax on out-of-state insurance companies, but not on local ones. Excepting *Prudential*, this Court has followed a strong equality rule in State Commerce Clause cases, highly disfavoring State laws that discriminate against out-of-State economic enterprises unless they were necessary to achieve a legitimate common nondiscriminatory State interest. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

Prudential represents a major deviation in Commerce Clause jurisprudence. It marked the beginning of what came to be known as the "Congressional Consent Doctrine" or the *Benjamin Principle*, a prescription that appeared to give Congress unlimited power to transform an otherwise invalid State action into a valid State action through "congressional consent." Under the Third Circuit's formulation, *it appears that Congress has assumed the power to authorize any State to*

discriminate against any interstate commerce it wishes. This conclusion is profoundly unreasonable; the Constitution attaches vital importance to the free and unimpeded flow of commerce among the States. The fundamental defect in the Third Circuit's view has been echoed artfully by one commentator:

> It is hard to imagine that a persuasive explanation of this pattern of judicial decisions could assume the form: When a state enacts a law with X characteristics, the act violates a constitutional norm of political morality because. . . . But when Congress ratifies the state act it no longer violates the norm because. . . .

Lawrence G. Sager, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 965 (Mar.-April 1985).

No one can credibly contest the place of judicial deference to legislative judgment among policy alternatives. But the wholesale subordination of judicial judgment to that of the legislature is the very danger that *Lopez* warned against. This Court stated in *Lopez* that although Congress is normally not required to make specific findings, such findings do assist the courts in evaluating the judgments Congress makes. *Lopez*, 115 S. Ct. at 1632. The scant congressional findings in this case bring to the forefront a concern that this Court has expressed for a very long time. In fact, nearly 150 years ago today, in *Cooley v. Board of Wardens*, 53 U.S. 12 (How.) 299 (1852), Justice Curtis wrote of the relationship between States and the negative Commerce Clause:

> If the States were divested of the power to legislate on this subject by the grant of the

> commercial power to Congress, it is plain this Act cannot confer upon them power thus to legislate. *If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.*

Id. at 318 (emphasis added). For this reason, in several of its recent decisions, the Supreme Court has asserted that it will not find congressional consent to discriminatory State regulations unless the permission is "expressly stated" or otherwise "unmistakably clear". *See, e.g., South Central-Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984).[8] The *Benjamin Principle*, however, has generally only been applied where a State action *follows* federal action, *i.e.*, a State is given clear authority under a comprehensive federal scheme (*e.g.*, the McCarran Act in *Prudential*) which, importantly, *precedes* State lawmaking. That simply did not occur here. Instead, the State tried its hand at the game first, was soundly turned back, and *then* recruited Congress to act on behalf of the State's proprietary interests. Such an approach — cart before the horse, chicken before the egg — is not the approach approved in the *Prudential* or *Wunnicke* lines of cases.

This is no small or incidental temporal distinction without a difference. The federal lawmaking came second because the federal interest is entirely derivative of the those local interests

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8. *Wunnicke* made it clear that "congressional authorization [should] not be lightly implied." *Wunnicke*, 467 U.S. at 92 n. 7. This principle was clearly violated in this case. The meager "legislative history" of the Interstate Wagering Amendment contains no specific congressional findings, no hearings, no reports, no statistics, no investigations, and no credible data upon which Congress could have based this exercise of its commerce power. The three-page Congressional Record of testimony (Pet. App. J at 111a-123a), along with the Amendment, was buried within a voluminous Crime Bill.

reposed in the several States. *See Edge Broadcasting*, 113 S. Ct. at 2708-09 (Stevens, J., dissenting) ("the United States does not assert a general interest in restricting state-run lotteries. . . . Rather, the federal interest in this case is entirely derivative."); *United States v. Fabrizio*, 385 U.S. 263, 269 (1966) (noting that "one of the principal purposes" of the federal statute was "aiding the States in the suppression of gambling where such gambling is contrary to state policy"). The most obvious confirmation of the exclusively derivative nature of the federal government's "interest" in the State-sponsored lottery context is found in the very text of the Interstate Wagering Amendment itself. As revised, Section 1301 authorizes the individual States, without consultation with or the approval of the United States, to agree among themselves to eliminate the criminal prohibitions of the Interstate Wagering Amendment. This characteristic, aligned with the federal lawmaking as second in time to the defective State legislation, meaningfully distinguishes this case from *Prudential* and *Wunnicke*.

Left unreviewed, the Third Circuit's decision here points to the danger of allowing Congress unbridled authority to use the *Benjamin Principle* as a means to uphold its otherwise unconstitutional action. In *Lopez*, Justice Thomas wrote that "[i]f we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be 'defined' as being 'commensurate with the national need' or self consciously intended to let the Federal Government 'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.' " *Lopez*, 115 S. Ct. at 1650-51 (Thomas, J, concurring) (citations omitted). If this is not the case, it is arguable that *any time* a State law is struck down under the dormant Commerce Clause, a State could ask Congress to legislate the identical end, but *without* finding any need for finding a national norm. *Congress simply has no such absolute trump card.*

If Congress could have enacted legislation which would have authorized the very conduct struck down by this Court in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), or *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and countless other, similar cases, the principle of federalism, as embodied in the Ninth and Tenth Amendments, would truly be a lifeless concept. If this were permissible, what would be the continuing point to the preservation of State and national distinctions?

The remedy for unconstitutional State laws is *not* an equally unconstitutional, but now effectively unreviewable, expansion of State power through federal legislation. No State should be permitted to end-run the dormant Commerce Clause by asking Congress to act in that State's peculiar interest. The proper role of Congress is national, not local. If there is such authority under the Commerce Clause, this Court must enunciate what the boundaries are within the sphere of Congress' commerce power. Otherwise, Congress would be given *carte blanche* authority to engage in exactly the kind of social engineering that *Lopez* cautioned against.

IV. THE CONSTITUTIONAL PRINCIPLE OF FEDERALISM LIMITS THE EXTENT TO WHICH THE COMMERCE CLAUSE MAY LOGICALLY BE INTERPRETED AS A GRANT OF "PLENARY" POWER TO CONGRESS.

In this case, federalism is the lens through which the commerce power must be viewed. The Constitution simply does not countenance, under the Commerce Clause or otherwise, the groundless interferences with the paramount rights of the people unless it is rational to conclude that people need government protection. "Federalism assures all persons of the right to decide for themselves, partly by keeping Congress altogether out."

Cellophane Sea, supra at 778. Moreover, "it is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents . . . [because] . . . the power of the people is superior. . . ." *The Federalist*, No. 78, at 395 (Alexander Hamilton) (Gary Wills Ed. 1987). This Court confirmed in *Lopez* the notion "that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 115 S. Ct. at 1634 (citations omitted). The Third Circuit minimized the legal significance of *Lopez*, and gave short shrift to this Court's analysis of the extent to which federalism limits the exercise of Congressional power under the Commerce Clause.

The Interstate Wagering Amendment balkanizes. It gives States discreet monopolies over their lotteries, and then extends, by federal legislation, those monopolies *beyond the States' own borders and past the citizens' right to participate in the free trade zone of interstate commerce.* The Interstate Wagering Amendment inhibits interstate commerce. Federalism is the bar over which this law must leap. Congress' decision to promote State economic monopolies must be scrutinized very closely. The Interstate Wagering Amendment presents the important question whether it is appropriate, as a matter of federal jurisprudential policy and constitutional authority, for Congress effectively to grant the States monopoly power beyond that which they can obtain (constitutionally) for themselves. While the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), confirm that legislatively created monopolies may be a classic exercise of the police power, the question here is much different, and asks whether a State sovereign, not acting in its "governmental" capacity but acting rather in its capacity as a "market participant," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991), can obtain monopolistic economic power by resort to Congress. A good analogy is this: could Congress, in an attempt to assist Pennsylvania in creating its own State-run casino industry, make

it a federal crime to operate a business that transports Pennsylvanians to New Jersey for casino gambling? Common sense dictates a resounding "No". The constitutional conclusion ought to be precisely the same.

The dissent in *The Lottery Case* phrased it this way: "Nobody would pretend that persons could be kept off trains because they were going from one state to another to engage in the lottery business." *The Lottery Case*, 188 U.S. at 374 (Fuller, J. dissenting). This type of "federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal government, a balance designed to *protect our fundamental liberties*." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (emphasis added). To paraphrase Justice O'Connor's dissent in *Garcia*, all that stands between the remaining essentials of people's liberty and Congress is the latter's underdeveloped capacity for self-restraint. *Id.* at 580-89. By making criminal an activity which helps people engage in undeniably legal conduct (playing a State lottery), the Interstate Wagering Amendment clearly overreaches. As the Middle District recognized in *Pic-A-State District I*, while Congress "has legislated to facilitate the operation of legal state lotteries, it has never characterized as worthy of protection a state's right to choose to allow its citizens to play only its own state-sponsored lottery." *Pic-A-State District I*, 1993 WL 325539, at *6.

This Court recently recognized in *Edge Broadcasting* that the majority of States have made a present positive value judgment about lotteries. This should not go unnoticed in evaluating the reach of Congress' power under the Commerce Clause. There is no legitimate federal interest in assisting States in preventing people from playing any State lottery they wish. The Interstate Wagering Amendment bears no rational relationship to controlling "interstate gambling". Congress, if

it has any derivative power to vindicate the States' interest, can only do so in a way that does not broaden the States' independent constitutional authority. By criminalizing the use of a courier service to make a purchase which would be entirely lawful if made in person, the Interstate Wagering Amendment exceeds the congressional commerce power. This crime is simply not "a reasonable and appropriate" regulation bearing "a real and substantial relation to the national interest." *Heart of Atlanta Motel, Inc.*, 379 U.S. at 255.

In its history and in its possible application, the Interstate Wagering Amendment serves no national federal interest. The search for "rationality" in this federal legislation is a futile task, just as is the search for power. When the very basis for the federal lawmaking (protection of the States' lottery judgments) has been lost by the States' own legislative enactments, the "derivative" federal interest is lost as well. *Edge Broadcasting* requires this, for, as *Lopez* demonstrates, the commerce power does indeed have limits. When those limits are transgressed, the law must fail.

Playing lotteries may be banned altogether. But when they are not, but instead are sponsored, advertised, and promoted by individual States acting, *not as taxing authorities but as participants in the competitive marketplace for consumers' entertainment dollars*, the States may not recruit the Federal Government to legislate for them a measure of economic protection that would offend the dormant Commerce Clause if the States had enacted the legislation on their own. Such power may only be invoked in a protective way, to address a known and accepted moral, physical, economic, or social danger that must be controlled by limiting its spread through interstate means. This power is not available to Congress when no such danger exists, nor may it be used between sovereigns to expand States' rights at the expense of individual freedom to engage in Commerce.

Petitioners urge review by this Court to preserve the proper constitutional balance between the States, the federal government, *and most importantly*, the people.

CONCLUSION

This case is about power — the unlimited power of Congress to use the Commerce Clause as a "trump card" in the form of a general federal police power to remedy and consent to underlying State violations of the dormant Commerce Clause. While this case presents an issue not addressed in *Lopez*, this Court's review of the Third Circuit's decision in *Pic-A-State II* fulfills the full promise of judicial review reiterated in *Lopez*. If Congress has an unlimited federal police power pursuant to the Constitution and *Prudential Insurance Co. v. Benjamin*, then it is time for the Court to say so directly; if it does not, as Petitioners believe is the case, then this Court must square the tension among *Lopez, Prudential*, and the Commerce Clause cases interpreting the outer boundaries of the federal police power. Nothing in the Court's prior decisions provides any clear statement that Congress can do what it did here. Justice Thomas, in his concurring opinion in *Lopez*, professed: "In an appropriate case, I believe that we must further reconsider the 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of our more recent Commerce Clause jurisprudence.") *Lopez*, 115 S. Ct. at 1642-43 (Thomas, J., concurring). This is that case.

For the foregoing reasons, Petitioners respectfully request the Court to grant this petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL A. FINIO
Counsel of Record
WILLIAM M. JANSSEN
SAUL, EWING, REMICK & SAUL
240 North Third Street, Suite 700
Harrisburg, Pennsylvania 17101
(717) 257-7500

Attorneys for Petitioners

May 13, 1996

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED FEBRUARY 13, 1996 (*PIC-A-STATE PA, INC. v. RENO*, 76 F.3d 1294 (3d Cir. 1996) (*PIC-A-STATE II*))

PIC-A-STATE PA, INC., Scott McLean,

Appellants,

v.

Janet RENO, in her official capacity as Attorney General of the United States of America; the United States Department of Justice; the United States of America.

No. 95-7137.

United States Court of Appeals,
Third Circuit.

Argued Nov. 13, 1995.

Decided Feb. 13, 1996.

Interstate lottery ticket seller brought action claiming that the Interstate Wagering Amendment, which prohibits interstate transmission of information to be used for purpose of procuring lottery tickets, is unconstitutional under commerce clause. The United States District Court for the Middle District of Pennsylvania, Sylvia H. Rambo, Chief Judge, dismissed complaint. Lottery ticket seller appealed. The Court of Appeals, Scirica, Circuit Judge, held that: (1) state lotteries affect interstate commerce for purposes of determining whether Congress had authority under commerce clause to enact Interstate Wagering Amendment, and (2) Congress had rational basis for adopting Amendment.

Affirmed.

Appendix A

* * *

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil Action No. 94-cv-01490).

Michael A. Finio (argued), Saul, Ewing, Remick & Saul, Harrisburg, Pennsylvania, William M. Janssen, Saul, Ewing, Remick & Saul, Philadelphia, Pennsylvania, for Appellants.

Matthew M. Collette (argued), Mark B. Stern, United States Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Appellees.

Before: BECKER and SCIRICA, Circuit Judges and COHILL, District Judge.[FN*]

OPINION OF THE COURT

SCIRICA, Circuit Judge.

Pic-A-State Pa., Inc. brings a Commerce Clause challenge to the Interstate Wagering Amendment, which amended 18 U.S.C. § 1301 (1994) by prohibiting the transmission in interstate commerce of information to be used for the purpose of procuring a lottery ticket. Because the Amendment regulates an activity affecting interstate commerce and rationally relates to the goals articulated by Congress, we hold the Amendment was a constitutional exercise of Congress' power to legislate under the Commerce Clause.

FN* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

I. FACTS AND PROCEDURAL HISTORY

Congress has restricted interstate traffic in lottery tickets for over a century. See generally United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993); see also Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90; Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465. Title 18 U.S.C. § 1301, the current prohibition on interstate traffic in lottery tickets, was enacted by Congress in 1895. Before amendment by the Interstate Wagering Amendment, § 1301 provided:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or any common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance, or any advertisement of, or list of prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

Act of March 2, 1895, 28 Stat. 963; 18 U.S.C. § 1301 (1988).

Appendix A

Pic-A-State Pa., Inc. is a Pennsylvania corporation that was engaged in the business of taking orders for, and purchasing, out-of-state lottery tickets on behalf of customers. Pic-A-State's operations were designed to avoid the longstanding prohibition on the interstate traffic in lottery tickets by keeping the tickets themselves in the state of origin and transferring only a computer-generated "receipt" to the customer.

The Commonwealth of Pennsylvania tried repeatedly to put a stop to Pic-A-State's operations. In 1993, the Pennsylvania legislature passed Act 8 of 1993, which prohibited the sale of any interest in another state's lottery. 72 Pa.Stat.Ann. § 3761-9(c) (1995). Pic-A-State challenged this legislation in federal court on dormant Commerce Clause grounds, and the statute was struck down by the district court. Pic-A-State Pa. v. Pennsylvania, No. 93-0814, 1993 WL 325539 (M.D.Pa. July 23, 1993). On appeal, we reversed citing an intervening change in federal law, the Interstate Wagering Amendment, which made the Pennsylvania statute fully consistent with federal law and not unduly burdensome on interstate commerce. Pic-A-State Pa. v. Pennsylvania, 42 F.3d 175, 178-80 (3d Cir. 1994) ("Pic-A-State I").

The Interstate Wagering Amendment amended 18 U.S.C. § 1301 by providing that, in addition to § 1301's extant prohibition on the transfer in interstate commerce of any lottery ticket, any person who:

> being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or

> appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a chance, share or interest; . . . shall be fined not more than $1,000 or imprisoned not more than two years, or both.

Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 320905, 108 Stat. 2126, 2147 (emphasis added). This Amendment was explicitly intended to prohibit Pic-A-State's line of business.

Senator Arlen Specter of Pennsylvania was the primary sponsor of the Interstate Wagering Amendment. He explained that "current law prohibit[s] interstate transfer of lottery tickets. . . . However, due to advances in communication technologies, current law does not accomplish its intended goals." 139 Cong.Rec. S15247. He also noted the district court's decision in Pic-A-State Pa. v. Pennsylvania, No. 930814, 1993 WL 325539 (M.D.Pa. July 23, 1993), allowed "the sale of interests in out-of-state lottery tickets via computer transaction with no paper crossing state lines." Id. The Amendment was designed to close this "loophole." Id.

Senator Specter identified two other purposes for the Interstate Wagering Amendment. First, that the Amendment was necessary to preserve "the right of a State to regulate lottery [sic] and gambling within its borders." Id. He stated, "Federal laws should continue to limit the proliferation of interstate gambling to preserve the sovereignty of States that do not permit certain forms of gambling." Id. Second, that businesses such as Pic-A-State's would "undermine [the states'] ability to realize projected revenues." Id. Senator Joseph Biden echoed Senator

Specter's concerns, noting the interstate sale of interests in lottery tickets "hurts the operation of lotteries in smaller States." Id.

Three days after the Interstate Wagering Amendment was signed into law, Pic-A-State filed this suit seeking injunctive relief and a declaratory judgment that the Amendment was unconstitutional. The district court dismissed Pic-A-State's complaint, finding no merit in any of its arguments. Pic-A-State Pa. v. Reno, No. 941490 (M.D.Pa. Feb. 23, 1995). Since passage of the Amendment, Pic-A-State has terminated its business.

We have jurisdiction to review the district court's final judgment dismissing the action under 28 U.S.C. § 1291 (1988). "Our standard of review is plenary." Juzwin v. Asbestos Corp., 900 F.2d 686, 689 (3d Cir.), cert. denied, 498 U.S. 896, 111 S.Ct. 246, 112 L.Ed.2d 204 (1990).

II. RIPENESS, STANDING AND EQUITABLE RELIEF

As an initial matter, the Government disputes whether the district court had jurisdiction to hear this case under 28 U.S.C. § 1331 (1988). Article III, section 2 of the United States Constitution requires an actual "controversy" for a federal court to have jurisdiction. U.S. Const. art. III, § 2. The Government argues no justiciable controversy exists because Pic-A-State has never been threatened with prosecution under amended § 1301. It asserts the controversy is not ripe, Pic-A-State lacks standing, and Pic-A-State is not entitled to equitable relief.[FN1] We will examine each of these contentions in turn.

FN1. The concepts of standing and ripeness require related but distinct inquiries. "The ripeness doctrine is often confused with the standing doctrine. Whereas ripeness is concerned with when an action may be brought, standing

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Appendix A

A. Ripeness

In Abbott Lab. v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977), and Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720-21, 75 L.Ed.2d 752 (1983), the Supreme Court held that ripeness turns on "the fitness of the issue for judicial decision" and "the hardship to the parties of withholding court consideration." For declaratory judgments, we have refined this test because declaratory judgments are typically sought before a completed injury has occurred. In determining whether to engage in preenforcement review of a statute in a declaratory judgment action, we look, among other factors, to (1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment. Freehold Cogeneration Assocs. v. Bd. Reg. Commtrs, 44 F.3d 1178, 1188 (3d Cir.), cert. denied, __ U.S. __, 116 S.Ct. 68, 133 L.Ed.2d 29 (1995); Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643, 647 (3d Cir. 1990). After considering these factors, we believe this case presents a controversy ripe for resolution.

1. Adversity of Interest

"For there to be an actual controversy the defendant must be so situated that the parties have adverse legal interests." Step-Saver, 912 F.2d at 648 (quoting 10A Charles A. Wright, Arthur R.

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focuses on who may bring a ripe action. Although these doctrines are analytically distinct, both have evolved from Article III's case or controversy requirement." Armstrong World Indus. v. Adams, 961 F.2d 405, 411 n. 13 (3d Cir. 1992) (citations omitted).

Miller & Mary Kay Kane, Federal Practice and Procedure § 2757, at 582-83 (2d Ed.1983)). Although Pic-A-State has not been prosecuted under the Interstate Wagering Amendment, the impact of the Amendment is sufficiently direct and immediate to create an adversity of interest between Pic-A-State and the Government. Not only has Pic-A-State terminated its business and suffered economic loss in response to the passage of the Amendment, but any further attempt to pursue its line of business would risk serious criminal penalties.[FN2] "Where the legal issue presented is fit for judicial resolution, and where a regulation requires immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to

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FN2. At oral argument, the Government suggested that review of the Interstate Wagering Amendment was inappropriate because the federal government was unlikely to prosecute Pic-A-State. Even if Pic-A-State were to resume its business, the Government asserted, any prosecution would be brought by the Commonwealth of Pennsylvania under Act 8 of 1993. Although a prosecution by state authorities would raise serious prudential concerns that might call for our abstention, see Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), we need not address this eventuality now. Furthermore, whether Pennsylvania has threatened to prosecute Pic-A-State is irrelevant to a possible federal prosecution under the amended 18 U.S.C. § 1301. The Government's argument would also place Pic-A-State in an untenable position. The district court found Act 8 to be unconstitutional under the dormant Commerce Clause in Pic-A-State Pa. v. Commonwealth of Pennsylvania, No. 93-0814, 1993 WL 325539 (M.D.Pa. July 23, 1993). We reversed because the intervening passage of the Interstate Wagering Amendment made Act 8 consistent with federal law. Pic-A-State I, 42 F.3d 175, 178-80 (3d Cir.1994). If the Interstate Wagering Amendment is unconstitutional, our decision in Pic-A-State I is of doubtful vitality and prosecution of Pic-A-State by Pennsylvania under Act 8 of 1993 would be suspect on dormant Commerce Clause grounds. Thus, regardless of whether Pic-A-State is prosecuted by state or federal authorities, the central issue in this case is the constitutionality of the Interstate Wagering Amendment. Yet the Government seeks to bar adjudication of this issue at this time.

noncompliance, access to the courts . . . under the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstances." Abbott Lab. v. Gardner, 387 U.S. at 153, 87 S.Ct. at 1518.[FN3]

Moreover, courts have found sufficient adversity between parties to create a justiciable controversy when suit is brought by the only plaintiff subject to regulation by an enactment. See, e.g., Illinois v. General Elec. Co., 683 F.2d 206, 210 (7th Cir 1982) ("as the Act has only one conceivable target . . . it is extremely unlikely that the state would overlook the violation," and the controversy is therefore ripe), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983); Entertainment Concepts, III v. Maciejewski, 631 F.2d 497, 500 (7th Cir.1980) (same), cert. denied, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). In introducing the Interstate Wagering Amendment, its sponsors were motivated by the desire to halt the operations of Pic-A-State specifically. See 139 Cong.Rec. S15247. Its chief sponsor mentioned the district court's decision in Pic-A-State Pa. v. Pennsylvania, No. 93-0814, 1993 WL 325539 (M.D.Pa. July 23, 1993), and explained the Amendment would close the "loophole" in the statute that allowed Pic-A-State to run its business. Id.

FN3. Pic-A-State argues that under Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), and Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." Steffel, 415 U.S. at 459, 94 S.Ct. at 1216. While this statement is undoubtedly true, we note both Babbitt and Steffel involved challenges to statutes that criminalized the exercise of First Amendment rights. Pic-A-State's claim does not involve these rights, and so we do not rely on Babbitt or Steffel in finding adversity between the parties.

Under these circumstances, we believe the likelihood of prosecution under the Interstate Wagering Amendment is so strong that a justiciable issue is presented.[FN4] We also note that the Government, although it has stated that a federal prosecution is unlikely, has not expressly disavowed an intent to prosecute. See Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1463-68 (3d Cir.1994) (failure of state to disavow intent to prosecute sufficient to create adversity between the parties); Salvation Army v. Department of Community Affairs, 919 F.2d 183, 192 (3d Cir.1990) (no adversity where state gives "express assurance that there will be no enforcement").

2. Conclusiveness

We next examine whether the issue raised here is "based on a 'real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts.' " Step-Saver, 912 F.2d at 649 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)) (emphasis added).

Where the question presented is "predominantly legal," a

FN4. Moreover, as a policy matter, strong reasons counsel against requiring Pic-A-State to engage in illegal conduct before its challenge can be heard. Fear that courts may find the statute valid will deter many from risking violation; defense of criminal proceedings on constitutional grounds simply is not an adequate remedy. In addition to this practical fact, more abstract principles suggest that a citizen should not be required to sacrifice his wish to conform to valid social prescriptions in order to test his belief of invalidity; citizens should be allowed to prefer official adjudication to private disobedience. 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532.5, at 183-84 (2d Ed.1984).

factual record is not as important as in fact-sensitive inquiries. Compare Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. at 201, 103 S.Ct. at 1720-21 (question of federal preemption is "predominantly legal" and need not await development of factual record); Abbott Lab. v. Gardner, 387 U.S. at 149, 87 S.Ct. at 1515-16 (declaratory judgment challenge to regulations presented purely legal issues fit for resolution even before prosecution instituted); with Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-95, 101 S.Ct. 2352, 2369-70, 69 L.Ed.2d 1 (1981) ("actual factual setting" is "particularly important in cases raising allegations of an unconstitutional taking of private property."). Because Pic-A-State brings a facial challenge to the constitutionality of the Interstate Wagering Amendment, further development of the factual record by the prosecution of Pic-A-State would not inform our legal analysis. Both parties have approached this case as one presenting the purely legal question of the scope of Congress' power to legislate under the Commerce Clause. The Government has made no attempt to justify the Interstate Wagering Amendment in factual terms. Accordingly, we believe the legal issues presented may be conclusively resolved even before the prosecution of Pic-A-State.

3. Utility

Finally, we focus on the utility of the present resolution of this dispute. We consider "whether the parties' plans of action are likely to be affected by a declaratory judgment." Step-Saver, 912 F.2d at 649 n. 9. Unlike our cases in which we have concluded that a judgment would not have a significant effect, see Armstrong World Indus. v. Adams, 961 F.2d 405, 423-24 (3d Cir.1992); Step-Saver, 912 F.2d at 649-50, we believe resolution of this case will materially affect the parties. Pic-A-State has abandoned its line of business because of the passage of the

Interstate Wagering Amendment. Were the Amendment to be declared unconstitutional, Pic-A-State would promptly resume its activities. Accordingly, we believe this case is ripe at this time.

B. Standing

The Government also attacks Pic-A-State's standing to bring this suit, asserting no harm is imminent because no prosecution is pending. As the Supreme Court has stated, "there is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the . . . rule they are quite clearly exposed to the imposition of strong sanctions." Abbott Lab. v. Gardner, 387 U.S. at 154, 87 S.Ct. at 1518. Accordingly, we find no merit in the Government's argument.

C. Equitable Relief

Finally the Government asserts equitable injunctive relief is unavailable because Pic-A-State is threatened with no immediate harm. The Government relies on Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and the line of cases that holds federal courts should not enjoin pending state criminal prosecutions. See, e.g., Douglas v. City of Jeannette, 319 U.S. 157, 163, 63 S.Ct. 877, 881, 87 L.Ed. 1324 (1943); Watson v. Buck, 313 U.S. 387, 400, 61 S.Ct. 962, 966, 85 L.Ed. 1416 (1941). Here there is no state prosecution, a federal statute is at issue, and there are no grounds for federal courts to abstain from hearing the challenge.

Therefore, we will reach the merits.

Appendix A

III. THE COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 9 Wheat. 1, 196 (1824). Accordingly, "[t]he task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. at 276, 101 S.Ct. at 2360. "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." Id. This established, the only remaining question for judicial inquiry is whether the means chosen by Congress are "reasonably adapted" to the asserted goals of the legislation. Id.; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258 (1964). "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." Hodel, 452 U.S. at 276, 101 S.Ct. at 2360; see also United States v. Pozsgai, 999 F.2d 719, 733 (3d Cir. 1993) ("We will uphold application of the law if there is a 'rational basis' for the congressional determination that the regulated activity 'affects interstate commerce,' and if the means chosen to regulate the activity are reasonable."), cert. denied, __ U.S. __, 114 S.Ct. 1052, 127 L.Ed.2d 373 (1994); United States v. Frame, 885 F.2d 1119, 1126 (3d Cir. 1989) ("It is well settled that Congress will have validly exercised its power to regulate interstate commerce if the activity being regulated affects commerce, and if there is a rational connection between the

regulatory means selected and the asserted ends."), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990).

A. Affects Commerce

It is beyond dispute that state lotteries affect interstate commerce. In the Lottery Case, 188 U.S. 321, 354, 23 S.Ct. 321, 326, 47 L.Ed. 492 (1903), the Supreme Court held that "lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State . . . is a regulation of commerce among the several states." Although Pic-A-State does not transport actual lottery tickets across state lines, but only sells interests in lottery tickets via computer, its activities may still be regulated by Congress. The power of Congress to regulate interstate commerce extends not only to "the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons and the transmission by telegraph of ideas, wishes, orders, and intelligence." Id. at 351-52, 23 S.Ct. at 325. Congress' power to regulate interstate commerce also reaches the transmission of information by computer for the purpose of purchasing lottery tickets. Moreover, Pic-A-State itself notes that national lottery sales exceeded $30 billion in 1993. Brief of the Appellants at 20 n. 5. A business of such enormous economic impact is a proper subject for congressional regulation under the Commerce Clause.

B. Rational Basis

1.

Accordingly, the task before us is to determine whether Congress acted rationally in adopting the regulatory scheme of

which the Interstate Wagering Amendment is a part. Hodel, 452 U.S. at 276, 101 S.Ct. at 2360. Pic-A-State asserts the Interstate Wagering Amendment cannot survive scrutiny under a "rational basis" review because it is not "reasonably adapted" to a legitimate end. It makes three arguments.

First, Pic-A-State argues the historical rationale for federal regulation of lotteries was Congress' perception that lotteries were "evils" to be strictly contained, if not absolutely prohibited. In the wake of the legalization of lotteries by over thirty states, Pic-A-State contends that regulation of lotteries as "evils" is no longer rational. Second, Pic-A-State asserts the protection of the states' ability to regulate gambling within their own borders is an impermissible purpose for federal lawmaking. Third, it contends the Interstate Wagering Amendment will insulate state lotteries from competition, and this restraint on trade is irrational.

Pic-A-State misapprehends the nature of a "rational basis" review of legislation under the Commerce Clause. We do not substitute our judgment for that of Congress. "Where the legislative judgment is drawn in question," our inquiry "must be restricted to the issue of whether any state of facts either known or which could reasonably be assumed affords support for it." United States v. Carolene Prod. Co., 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938). The Supreme Court's recent decision in United States v. Lopez, __ U.S. __, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), does not change the nature of this inquiry. Lopez asks whether the activity at issue could rationally be understood to affect commerce. The Court did not reach the question of whether the legislation itself was rationally related to its announced goal.[FN5]

FN5. The impetus behind striking down the Gun-Free School Zones Act under the Commerce Clause in Lopez was a concern for federalism. See United

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In introducing the Interstate Wagering Amendment on the Senate floor, its proponents advanced several justifications, including the prevention of reductions in state lottery revenues, the preservation of "the sovereignty of State lottery programs," and the enforcement of the federal laws prohibiting interstate gambling. See 139 Cong.Rec. S15247. The Interstate Wagering Amendment is rationally related to achieving these goals.

First, Congress could rationally determine that the sale of interests in lottery tickets across state lines might cause revenue shortfalls in some lottery states, particularly smaller states. The Chair of the Pennsylvania Council on Aging stated in a letter to Senator Specter that the sale of out-of-state lottery tickets would "have a direct and negative impact on Pennsylvania lottery sales.[FN6] The final result will be revenue losses for programs that assist very vulnerable older citizens of Pennsylvania."[FN7] 139 Cong.Rec. S15247. The Governor of Delaware also submitted a letter complaining that such sales "have the potential to negatively affect state revenues from lottery ticket sales, especially for smaller states." Id. at S15248. As Senator Specter noted, "[a]ny erosion of revenues due to the sale of out-of-State

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States v. Lopez, __ U.S. __, __, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626 (1995). The Interstate Wagering Amendment supplements and guarantees, not usurps, the states' power to regulate their own lotteries. Despite Pic-A-State's arguments, it therefore seems an unsuitable object for a Commerce Clause challenge under Lopez.

FN6. The Director of Public Relations and Special Events for the Pennsylvania Lottery testified that "800,000 to a million dollars" is an "extremely conservative" estimate of the losses suffered by the Pennsylvania lottery in 1991-92 due to the interstate sale of lottery tickets. App. at 213a-215a.

FN7. Proceeds from the Pennsylvania lottery are earmarked for programs that benefit senior citizens. See 72 Pa.Stat.Ann. § 3761-2 (1995).

lottery tickets is contrary to the purpose of State lottery programs." Id. at S15247. "State lottery programs are based on the premise that the revenues derived from the lottery go toward State programs for the betterment of that particular State." Id. Congress made a reasonable determination that the prohibition of interstate sales of lottery tickets would promote the purposes for which the various states have instituted lotteries. We will not second-guess this judgment.

Moreover, Congress rationally believed that the Interstate Wagering Amendment served the purpose of preserving state sovereignty in the regulation of lotteries. Senator Specter explained:

> the right of a State to regulate lottery [sic] and gambling within its borders must be preserved. Federal gambling laws have traditionally enabled the States to regulate in-State gambling. Federal laws should continue to limit the proliferation of interstate gambling to preserve the sovereignty of States that do not permit certain forms of gambling.

Id. The Interstate Wagering Amendment furthered these goals by giving the states the sole right to regulate lottery sales within their borders. The states need not permit the sale of interests in out-of-state lottery tickets, but may do so by concluding an agreement for that purpose with other states. 18 U.S.C. § 1301. The Interstate Wagering Amendment thus allows the various states to gauge the economic effects of their own lotteries without out-of-state interference, to form their own judgments about the propriety of lotteries, and to regulate the types of state-sponsored gambling they wish to allow within their borders.

Finally, Congress could rationally conclude that the Interstate Wagering Amendment was necessary to effectuate the purposes for which 18 U.S.C. § 1301 was originally enacted. As Senator Specter stated, the federal gambling laws were clearly intended to prohibit the interstate transportation and sale of lottery tickets, but "the development of communications technology resulted in [a] loophole in the Federal lottery law" that allowed such transactions to be consummated by computer with no papers crossing state lines. 139 Cong.Rec. S15247. Both Pennsylvania Senators believed this loophole "plainly violat[ed] the spirit and intent of the Federal law" and introduced the Interstate Wagering Amendment in order to close it. Id. at S15247-48.

In the context of the one-hundred year history of § 1301 and the federal regulation of lotteries, Congress could rationally conclude the need for an amendment to close a loophole created by advances in technology unforeseeable at the time the statute was originally drafted. Congress believed that since the sale of lottery tickets across state lines was illegal, the sale of interests in tickets across state lines by computer should be illegal as well. We believe the Commerce Clause requires no more indication of rationality for us to uphold the statutory scheme adopted by Congress.[FN8]

FN8. Pic-A-State notes Congress did not conduct fact-finding or rely on empirical research in drafting the Interstate Wagering Amendment and argues that this undermines the Amendment's rationality. We are unpersuaded, as several of the justifications advanced by Congress are rational on their face. Pic-A-State further argues Congress' conclusion that the Amendment would prevent revenue shortfalls in smaller states is mistaken as a factual matter. Even were this so, we would uphold the Interstate Wagering Amendment under rational basis review. Rational basis review "is not a license for courts to judge

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2.

Even evaluating the rationality of the Interstate Wagering Amendment on the terms suggested by Pic-A-State, we hold it was a constitutional exercise of Congress' power to legislate under the Commerce Clause. Pic-A-State argues that because lotteries have been legalized by the majority of states, the interstate sale of lottery tickets may no longer rationally be prohibited on moral grounds. We disagree. Although many states have legalized lotteries, some have not. Congress could rationally decide to legislate in support of the policies of nonlottery states by placing the regulation of lotteries within the discretion of each state and prohibiting out-of-state interference. See United States v. Edge Broadcasting Co., 509 U.S. 418, __, 113 S.Ct. 2696, 2703, 125 L.Ed.2d 345 (1993) ("[T]he Government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries."); Lottery Case, 188 U.S. at 357, 23 S.Ct. at 327 (Congress may "supplement[ ] the action of those States . . . which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits."). Moreover, in arguing that the Interstate Wagering Amendment is irrational because lotteries are no longer morally proscribed, Pic-A-State necessarily implies that all of 18 U.S.C. § 1301, not just the Interstate Wagering Amendment, is now irrational. As we have noted, § 1301 has been in the United States Code since 1895 and

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the wisdom, fairness, or logic of legislative choices." (FCC v. Beach Communications, 508 U.S. 307, __, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993)). "Congress need not make particularized findings in order to legislate." Perez v. United States, 402 U.S. 146, 156, 91 S.Ct. 1357, 1362, 28 L.Ed.2d 686 (1971).

was upheld by the Supreme Court against a Commerce Clause challenge. Lottery Case, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903). We do not believe that circumstances have changed so substantially as to render this body of law unconstitutional.

As for Pic-A-State's argument that the Interstate Wagering Amendment is contrary to the spirit of the antitrust laws and therefore irrational, "neither the Sherman Act nor any other antitrust statute restricts the United States government in directing action in complete contradiction to antitrust policy." Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C.Cir.1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) (citations omitted). The interstate sale of lottery tickets affects commerce and is contrary to the policy of several states. In these circumstances, Congress can rationally exercise its enumerated powers to prohibit the passage in interstate commerce of lottery tickets or information relating to them.

IV. DORMANT COMMERCE CLAUSE

Pic-A-State also contends Congress did not have the power to enact the Interstate Wagering Amendment. Under dormant Commerce Clause principles, states may not discriminate against the flow of out-of-state goods in commerce. Pic-A-State asserts that Congress, in legislating to supplement the states' police powers, cannot give the states the power to discriminate against out-of-state goods because such discrimination is forbidden by the dormant Commerce Clause.

The Supreme Court rejected this argument in Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). In Benjamin, South Carolina imposed a three percent tax on foreign insurance companies as a condition of their doing

business in the State. No similar tax was imposed on South Carolina corporations. By statute Congress had authorized state regulation and taxation of the business of insurance. Id. at 412, 429-30, 66 S.Ct. at 1146, 1154-55; Prudential challenged the discriminatory tax, contending Congress could not legislatively override the dormant Commerce Clause's prohibition on discriminatory state legislation. Rejecting Prudential's argument, the Supreme Court distinguished between the Commerce Clause and the dormant Commerce Clause:

> The one limitation bounds the power of Congress. The other confines only the powers of the states. And the two areas are not coextensive. The distinction is not always clearly observed, for both questions may and indeed at times do arise in the same case and in close relationship. But to blur them and thereby equate the implied prohibition with the affirmative endowment is altogether fallacious. There is no such equivalence.

Benjamin, 328 U.S. at 423, 66 S.Ct. at 1152. The Supreme Court concluded the Commerce Clause places no limitations on Congress' affirmative power to legislate, other than that the regulated activity must affect commerce. Id. It is now clear that Congress may consent to state regulation that discriminates against interstate commerce. Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 174, 105 S.Ct. 2545, 2553, 86 L.Ed.2d 112 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); Pic-A-State I, 42 F.3d 175, 179 (3d Cir.1994). Congress had the authority to enact the Interstate Wagering Amendment in order to supplement state legislation,

even though the Amendment enables states to discriminate against out-of-state lottery tickets.

V. CONCLUSION

The Interstate Wagering Amendment regulates lotteries — an activity affecting interstate commerce. It rationally relates to Congress' goals of protecting state lottery revenues, preserving state sovereignty in the regulation of lotteries, and controlling interstate gambling. The Amendment was a constitutional exercise of Congress' power to legislate under the Commerce Clause. We will affirm.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 13, 1996 (*PIC-A-STATE II*)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7137

PIC-A-STATE PA, INC., SCOTT McLEAN,

Appellants

v.

JANET RENO, in her official capacity as Attorney General of the United States of America; THE UNITED STATES DEPARTMENT OF JUSTICE; THE UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 94-cv-01490)

Present: Becker, Scirica, *Circuit Judges*, Cohill, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel November 13, 1995.

On consideration whereof, it is now here ordered and

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* Hon. Maurice B. Cohill, Jr., U. S. District Judge, for Western District of PA, sitting by designation.

adjudged by this Court that the judgment of the said District Court entered February 24, 1995, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: February 13, 1996

Certified as a true copy and issued in lieu
of a formal mandate on April 5, 1996

Teste: s/ illegible

Chief Deputy Clerk, United States Court
of Appeals for the Third Circuit

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED JULY 23, 1993 (*PIC-A-STATE PA, INC. v. PENNSYLVANIA*, NO. 1:CV-93-0814, 1993 WL 325539 (M.D. PA. JULY 23, 1995 (*PIC-A-STATE DISTRICT I*))

PIC-A-STATE PA., INC.; Zack's Frozen Yogurt; Smitty's Place, Inc.; K & J Stationery, Inc.; and James Russell, Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, Department of Revenue; and Eileen H. McNulty, Defendants.

Civ. A. No. 1:CV-93-0814.

United States District Court, M.D. Pennsylvania.

July 23, 1993.

Michael A. Finio, Ronald M. Katzman, Judith G. Hirsh, Karen S. Feuchtenberger, Harrisburg, PA, for plaintiffs.

Calvin R. Koons, Anne K. Fiorenza, Atty. General's Office, Harrisburg, PA, for defendants.

Harvey W. Daniels, Pittsburgh, PA, for intervenor.

MEMORANDUM

RAMBO, Chief Judge.

Before the court is the task of resolving the captioned

declaratory and injunctive action. The matter has been orally argued, fully briefed and is ripe for disposition.

Background

I. Procedural History

On June 1, 1993, Plaintiffs filed their complaint challenging, on a number of grounds, the constitutionality under federal law of Act 8 of 1993. Act 8, the Commonwealth's recent amendment to its lottery statute,[1] was signed into law on May 20, 1993. On June 3, 1993, this court granted Plaintiffs' motion for consolidation under Federal Rule of Civil Procedure 65(a)(2) and set the case for a consolidated hearing/trial on July 9, 1993. Both sides submitted briefs on the issues involved. On July 7, 1993, the parties reached stipulations of fact which all agreed made a hearing/trial unnecessary. Instead, the court heard oral argument on July 9, 1993, and requested supplemental briefing from the parties.

Act 8 was to become effective on July 19, 1993, sixty days from passage. Because the court feared its decision would not be complete by July 19, on July 15, 1993, it issued a stay barring indictments or prosecutions under Act 8 through July 23, 1993.

II. The Provisions of Act 8

The Pennsylvania State Lottery was established by the State Lottery Law, enacted in 1971. See 72 Pa.Stat.Ann. § 3761-1, et seq. According to Commonwealth statute, the Pennsylvania

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1. That statute, entitled the State Lottery Law, is found at 72 Pa.Stat.Ann. § 3761-1 et seq.

Appendix C

State Lottery is the only lawful lottery which may be conducted in Pennsylvania. See 18 Pa. Cons.Stat.Ann. § 5512(a), (b), (d). All profit from the Pennsylvania State Lottery is allocated to the needs of senior citizens. See 72 Pa.Stat.Ann. § 3761-12.

Section 9(C) of Act 8 of 1993, the challenged amendment to the State Lottery Law, provides that:

> Except as provided in this Act, no person shall engage in the sale or offering for sale within this Commonwealth of any interest in a lottery of another state or government whether or not such interest is an actual lottery ticket, receipt, contingent promise to pay, order to purchase or other record of such interest.

Act 8, Section 9(C).[2] Under Section 9(D) of Act 8, violation of Section 9(C) was to be a misdemeanor punishable by a fine not to exceed two thousand dollars. Act 8's only exception to the bar against the sale of interests in the lottery of another state or government is the following:

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2. Prior to the passage of Act 8 of 1993, the Commonwealth brought an action in the Commonwealth Court of Pennsylvania (No. 218 M.D. 1991), seeking to enjoin the operation of Pic-A-State's business. The action was based on Pic-A-State's purported violation of Pennsylvania's consumer protection and existing lottery law, as well as federal criminal law. However, in a memorandum and order filed August 19, 1991, President Judge Craig denied injunctive relief. He concluded that Pic-A-State's business violated none of the statutes raised by the Commonwealth. His decision was affirmed by the Pennsylvania Supreme Court, without opinion, in September 1992. (See Parties' Stip. of Facts at ¶ 14-16; Ex. B, Compl.)

Appendix C

> Compact to Sell Tickets. — The secretary [of the Department of Revenue] shall enter into a compact with any other states that permit sale of Pennsylvania lottery tickets within their borders to sell those state's lottery tickets within this Commonwealth.

Act 8, Section 9.1.

III. The Plaintiffs and Business at Issue

The following facts are undisputed: Plaintiff Pic-A-State PA, Inc. ("Pic-A-State") is a Pennsylvania corporation with its principal place of business in New Jersey. It conducts its business in Pennsylvania through approximately 165 retail locations, such as plaintiff Zack's Frozen Yogurt ("Zack's"), and characterizes that business as one of service to Pennsylvania citizens.

At locations such as Zack's, ticket orders are received from those desiring to participate in the legally authorized lotteries of states other than the Commonwealth. One such customer is plaintiff James Russell. Upon placement of the ticket order, the Pic-A-State retail outlet agent transmits the information via its Pennsylvania computer terminal to purchasing agents in the state where the relevant lottery is located. Two such purchasing agents are plaintiffs Smitty's Place, Inc. (located in Florida) and K & J Stationery, Inc. (in New York). Such agents purchase the lottery tickets directly from the lottery agents of that state.

Upon receipt of the ticket order, the Pic-A-State retail outlet agent provides its Pennsylvania customer with a receipt either

bearing the numbers that the customer has requested to be played or the numbers picked by the quick-pick computer process. The customer is not given the actual lottery ticket, which remains in the state of purchase, on behalf of the ordering customer. For its service, Pic-A-State charges a fee of $1.00 for each ticket order placed; the profits of the business come from these service charges.

Pic-A-State asserts that the cited provisions of Act 8 violate the Commerce Clause of the United States Constitution by placing an undue burden on interstate commerce. Pic-A-State further contends that Act 8 violates federal antitrust laws, as well as the Contracts Clause, First Amendment and Equal Protection Clause of the federal Constitution.

Legal Discussion

I. Eleventh Amendment

On July 16, 1993, the Commonwealth filed an answer asserting the Eleventh Amendment as a defense to suit against the Commonwealth and the Department of Revenue. The answer was originally stricken, but the court has permitted its reinstatement. Regardless of Defendants' answer, this court has authority to address an Eleventh Amendment jurisdictional bar sua sponte. See Anheuser-Busch, Inc. v. Goodman, 724 F.Supp. 345, 346 (M.D.Pa. 1989); Kuchka v. Kile, 634 F.Supp. 502, 510 (M.D.Pa.1985).

Eleventh Amendment case law has established that, whatever the nature of the relief sought, "in the absence of consent a suit [in federal court] in which the State or one of its agencies or departments is named as the defendant is proscribed

by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). In the instant case, the Commonwealth has not waived its Eleventh Amendment immunity or consented to suit. See 42 Pa. Cons.Stat.Ann. §§ 8521(b), 8522. However, case law does permit suits challenging the constitutionality of state officials' actions and seeking prospective injunctive relief (and complementary declaratory relief) to be instituted against those named state officials. Pennhurst, 465 U.S. at 100-102; Papasan v. Allain, 478 U.S. 265, 276-77 (1986); Ex Parte Young, 209 U.S. 123 (1908). Hence, the Commonwealth Department of Revenue will be dismissed as an improper defendant under the Eleventh Amendment. To the extent that the Commonwealth itself was intended as a defendant (the pleading captions are ambiguous), the Commonwealth is similarly dismissed. However, Ms. McNulty, Secretary of the Department of Revenue, remains a defendant characterized as proper and sufficient by both sides in this dispute.

II. Federal Criminal Statutes

One of Defendants' arguments, raised both at oral argument and in supplementary briefing to the court, was that Pic-A-State's business violated or "violated the intent of" certain federal laws: 18 U.S.C. § 1301 (Importing or Transporting Lottery Tickets); 18 U.S.C. § 1953 (Interstate Transportation of Wagering Paraphernalia), and 18 U.S.C. § 1084 (Transmission of Wagering Information). Defendants contended that, since the behavior barred by the challenged provisions of Act 8 was illegal under federal law, there was, at most, a minimal interstate commerce interest to be protected via a challenge to Act 8.

Appendix C

Plaintiffs strenuously object to any consideration of these federal criminal statutes by the court, labeling any such examination an improper advisory opinion. The court does not believe its consideration of Defendants' contentions to be inappropriate; whether Congress has directly addressed the relevant conduct could impact a legal analysis under the Commerce Clause.

Criminal statutes are to be strictly construed. United States v. Alpirn, 307 F.Supp. 452, 454 (S.D.N.Y.1969); United States v. Bergland, 209 F.Supp. 547, 549-50 (E.D.Wis. 1962), rev'd on other grounds, 318 F.2d 159 (7th Cir. 1963), cert. denied sub. nom., Cantrell v. United States, 375 U.S. 861 (1963).

In a case which is still good law, the United States Supreme Court narrowly held that 18 U.S.C. § 1301[3] bars only the interstate transportation of lottery tickets or similar instruments which represent to the purchaser his or her means of making good his lottery rights.[4] Francis v. United States, 188 U.S. 375, 378 (1903). In the instant case, no such instruments have moved in interstate commerce.

Title 18 U.S.C. §§ 1953 and 1084 were both enacted on the same day. By its terms, § 1953 bars the transportation of

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3. The relevant provisions of 18 U.S.C. § 1301 bar the "carr[ying] in interstate commerce or foreign commerce any paper, certificate, or instrument pruporting to be or to represent a ticket chance, share, or interest in or dependent upon the event of a lottery . . . ." 18 U.S.C. § 1301.

4. See H.Rep. No. 87-968, 87th Cong., 1st Sess. (1961) (addressing law later codified as 18 U.S.C. § 1953) (this bill designed to close loopholes resulting from narrow limitation courts have put on reach of 18 U.S.C. § 1301).

wagering paraphernalia, but addresses only tangible objects.[5] In the instant case, the only movement in interstate commerce occurs with regard to computer communications, over telephone lines, from one Pic-A-State terminal to another in a different state.[6] These transmissions communicate customer orders for lottery tickets, along with the numbers upon which customers desire to bet. The court is not persuaded that Congress intended the terms of § 1953 to be stretched to address wire communications, especially when, on the very same day that Congress enacted § 1953, it also enacted § 1084, a provision explicitly addressed to wire communications.[7]

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5. Title 18 U.S.C. § 1953 criminalizes the carrying or sending in interstate or foreign commerce of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both." 18 U.S.C. § 1953(a).

6. Hence, this case is distinguishable from United States v. Stuebben, 799 F.2d 225 (5th Cir. 1986), in which a "messenger" business, which purchased tickets for customers, sent actual betting slips across state lines, resulting in the defendant's conviction under 18 U.S.C. § 1953, and supplied the actual tickets to the customers, resulting in the defendant's conviction under 18 U.S.C. § 1301.

7. Title 18 U.S.C. § 1084 provides for penalties when "whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers. . . ." 18 U.S.C. § 1084(a).

Finally, 18 U.S.C. § 1084, the wire communications provision, reaches only the conduct of those who are "engaged in the business of betting or wagering."[8] While courts have held that violators need not exclusively be engaged in such a business, United States v. Scavo, 593 F.2d 837, 843 (8th Cir. 1979); Truchinski v. United States, 393 F.2d 627, 630 (8th Cir.), cert. denied, 373 U.S. 831 (1968), the requirement remains a necessary element for criminal conduct. Courts considering the phrase "business of betting or wagering" appear to have universally concluded that it involves a professional gambling or bookmaking business. See, e.g., United States v. Sutera, 933 F.2d 641, 649 (8th Cir. 1991) (phrase "engaged in the business of betting or wagering" means that running gambling business fundamental aspect of § 1984); United States v. Sellers, 483 F.2d 37, 45 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974) (§ 1084 "deals with bookmakers — persons 'engaged in business of betting or wagering' "); United States v. Marder, 474 F.2d 1192, 1194 (5th Cir. 1973) (burden on government to establish defendant as "in the business of gambling or in common parlance, . . . a bookie"); United States v. Baborian, 528 F.Supp. 324, 327-28 (D.R.I. 1981) (citing legislative history indicating that § 1084 aimed at bookmakers and professional gamblers whose business is to take and lay off bets).[9] The court is not persuaded that Pic-A-State is engaged in "the business of wagering and betting" as that phrase has been construed: they set no odds, accept no wagers and distribute no risks.[10]

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8. See note 5.

9. The Barborian court concluded that "Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets. . . ."

10. Given the above conclusions, the court need not address Plaintiffs' contention that the various exceptions involving state lotteries which are incorporated into the three federal statutes apply to Plaintiffs. See 18 U.S.C. § 1307(b), 18 U.S.C. § 1953(b)(4) & 18 U.S.C. § 1084(b).

Hence, the court is persuaded that Pic-A-State's business is not in violation of current federal law because Congress has not yet addressed the conduct at issue.

III. The Commerce Clause

A. Standards of Review

The Commerce Clause is aimed at ensuring that our nation would operate as a single economic unit, with economic Balkanization or isolation of individual states to be avoided. Norfolk S. Corp. v. Oberly, 822 F.2d 388, 399 (3d Cir. 1987). The Clause explicitly reserves to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. While its explicit terms refer only to the power of Congress, it has been long recognized that the Clause "also limits the power of the States to erect barriers against interstate trade." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980).

The Commerce Clause's limitation on state power has become known as the "dormant Commerce Clause;" it applies to "the powers of the states in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state activity." Norfolk, 822 F.2d at 392. As such, it prohibits "economic protectionism," "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988).

Congress may create an exception to the reach of the dormant Commerce Clause by giving its explicit consent to an extension of state authority to regulate interstate trade beyond what the Commerce Clause would permit. Id. at 392-93. However, courts will only hold that this has occurred when

"Congress has 'affirmatively contemplate[d] otherwise invalid state legislation' . . . and '[w]here state or local government action is specifically authorized by Congress.' " Id. at 392-93 (citations omitted) (brackets in original). See also Maine v. Taylor, 477 U.S. at 139.

Over the years, various standards of review have been applied by courts to determine if a state has overstepped the bounds of the dormant Commerce Clause. The Third Circuit has repeatedly stated the current standards in the following way:

> 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

Norfolk, 822 F.2d at 398-399.[11] See also Maine v. Taylor, 477 U.S. at 138.[12]

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11. See Old Bridge Chems. Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1291 (3d Cir.), cert. denied, 113 S.Ct. 602 (1992); Juzwin v. Asbestos Corp., 900 F.2d 686, 689 (3d Cir.), cert. denied, 498 U.S. 896 (1990); Ford Motor Co. v. Insurance Commtr of Pa., 874 F.2d 926, 941 (3d Cir.), cert. denied sub. nom., United Servs. Auto Asstn v. Foster, 493 U.S. 969 (1989).

12. Maine v. Taylor cites two standards of review, omitting the second standard listed by the Third Circuit in the four cases cited. None of the Supreme

(Cont'd)

Appendix C

The heightened scrutiny applied to factual contexts which fit within the first in the list of Third Circuit standards is so strict that in practice it "turns out to be 'a virtually per se rule of invalidity." Norfolk, 822 F.2d at 400 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). See also Maine v. Taylor, 477 U.S. at 148. This heightened scrutiny puts the burden on the state to show that the challenged statute serves a legitimate local purpose which could not be served as well by available nondiscriminatory means. Norfolk, 822 F.2d at 400 (citing Maine v. Taylor, 477 U.S. 131 (1986)); Juzwin, 900 F.2d at 689. It has been said that heightened scrutiny is the standard appropriately applied to statutes which are "simple economic protectionism." Norfolk, 822 F.2d at 400. This includes measures that facially discriminate against out-of-state interests or in favor of in-state interests, and neutral measures motivated by discriminatory purpose. Id. at 400. A statute which on its face applies without regard to the citizenship of commercial competitors but imposes discriminatory costs and/or requirements on sellers of out-of-state products (as compared to in-state sellers) is also appropriately addressed by this heightened standard. See Old Coach Dev. Corp. v. Tanzman, 881 F.2d 1227, 1232 (3d Cir. 1989); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

The next Third Circuit standard, deferential review, has been applied by it only to cases involving evenhanded highway safety regulations with no uniformity implications. Norfolk, 822 F.2d at 405. It apparently has been crafted by the Third Circuit from a long series of Supreme Court cases in which the Supreme Court addressed challenges to state highway regulations enacted

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(Cont'd)

Court cases cited by the parties for the dormant Commerce Clause legal standard explicitly discuss this second standard of the Third Circuit.

in the name of highway safety, an area in which the Court has traditionally and explicitly afforded great deference to the states. See American Trucking Ass'ns, Inc. v. Larson, 683 F.2d 787 (3d Cir.), cert. denied, 459 U.S. 1036 (1982). Until the Third Circuit or Supreme Court explicitly expands the application of this standard to other subjects, it should be limited to the context in which it arose.

The final Third Circuit standard involves the following balancing test for facially neutral statutes: "[I]f a statute regulates 'evenhandedly' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " Norfolk, 822 F.2d at 405 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) (quotation marks in original source). The "incidental burden" considered in the balancing process is "the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce. It is a comparative measure." Ford Motor Co. v. Insurance Com'r of Com. of Pa., 874 F.2d 926, 942 (3d Cir.), cert. denied sub. nom., United Servs. Auto Ass'n v. Foster, 493 U.S. 969 (1989) (emphasis in original).

B. Relationship Between State Lottery Laws and the Commerce Clause

Defendants emphasize the broad police powers accorded the states, permitting states to regulate "to promote the public health, the public morals or the public safety," Philadelphia Nat'l Bank v. United States, 666 F.2d 834, 840 (3d Cir.1981), cert. denied, 457 U.S. 1105 (1982), and the consequential special authority the states possess vis-a-vis lotteries. They implicitly

contend that the states are deserving of some special deference in the lottery/gambling context.

States have long viewed lotteries to be hazardous to their citizens and legislated to control this type of gambling. United States v. Edge Broadcasting Co., 61 U.S.L.W. 4759, 1993 WL 220272 at *3 (U.S. 1993). However, the authority of Congress under the Commerce Clause to regulate interstate traffic and commerce in lotteries is also clear. See, e.g., Champion v. Ames, 188 U.S. 321, 356-57 (1903). And, historically, one of the purposes Congress has sought to further in exercising that authority is to supplement the action of those states which have barred lotteries and the sale of lottery tickets, so that the declared policy of these states would not be overthrown by the agency of interstate commerce. Id. at 357 (regarding the law now codified as 18 U.S.C. § 1301); United States v. Fabrizio, 385 U.S. 263, 269 (1966) (regarding 18 U.S.C. § 1953). Even when Congress has enacted exemptions to federal statutes to facilitate the operation of legal state lotteries, it has done so in a manner which continues to stress and protect the interests of non-lottery states. See H.Rep. No. 1517, 93rd Congress, 2d Sess. (1974), reprinted at 93 U.S.C.C.A.N. 7007, 7011 (regarding 18 U.S.C. §§ 1953, 1307) (one of interests to be balanced in bill was consideration and protection of policies and interests of states which do not provide for lotteries); Edge Broadcasting, 1993 WL 220272 at 3 (exemption in § 1307 enacted to accommodate legally authorized state lotteries but continue to protect policies of non-lottery states).

In two of its lottery-related bills, Congress has even included provisions stating that "[n]othing contained in this section shall create immunity from criminal prosecution under any laws of any State. . . . " 18 U.S.C. § 1953(c); 18 U.S.C.

§ 1084(c). However, Congress has never affirmatively consented to or indicated approval of extending state authority to regulate lotteries beyond what would be permissible under the dormant Commerce Clause. Alternatively, while it has legislated to facilitate the operation of legal state lotteries, it has never characterized as worthy of protection a state's right to choose to allow its citizens to play only its own state-sponsored lottery. Its emphasis has been on protecting the states that choose to prohibit lotteries.[13]

Thus, whatever the authority of an individual state to authorize a state lottery or to allow no lotteries at all, that state's authority remains bound by the dormant Commerce Clause just as it is in other subject areas.[14] With this as a given, the court will proceed to address the Commerce Clause.[15]

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13. A blanket prohibition of all lotteries puts all lottery businesses (market participants), intrastate and interstate, in the same status. In that situation, commerce may be inhibited, but interstate commerce is not. There could be no Commerce Clause challenge to such a law. See Norfolk S. Corp. v. Oberly, 822 F.2d 388, 406 (3d Cir. 1987).

14. There has been no argument from any party that the State is a market participant not bound by the Commerce Clause in the factual context presented by the instant case.

15. In the instant case, the court writes on a clean slate. While a number of courts, including the Pennsylvania Commonwealth Court, have considered whether businesses like Plaintiffs' violate state law, there has been no federal constitutional analysis of state laws addressing such conduct. See Chun v. New York, 807 F.Supp. 288 (S.D.N.Y. 1992) (abstaining in presence of number of state court cases); Commonwealth v. Goen, No. 218 M.D. 1991 (Pa.Commw.Ct. Aug. 19, 1991) (no violation of state law); State v. Fiola, 576 A.2d 338 (N.J.Super. 1990) (violation of both state constitution and statutes); State v. Powell, 567 A.2d 568 (N.H. 1989) (no violation of language of state statute).

Appendix C

Pennsylvania citizens can purchase tickets to, or bet in, the legally authorized Pennsylvania lottery but, under the provisions of Act 8, they cannot do the same with any other legally authorized state lotteries unless they personally travel to their sites. An exception exists to this rule, but only for those states who enter into reciprocal agreements to allow the sale of Pennsylvania state lottery tickets. Defendants have not disputed, in either briefing or argument, that these provisions facially discriminate against interstate commerce. Given the court's earlier analysis, the proper standard to apply is that of heightened scrutiny; the court must examine the underlying purpose of the challenged statute and whether it could be as well served by available nondiscriminatory means.

C. Purpose of Act 8

In examining the purpose behind the statute, the court is somewhat constrained, as Third Circuit law makes clear that in a Commerce Clause analysis of a Pennsylvania statute, the court may not consider legislative floor discussion as binding proof of legislative intent. Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 616 (3d Cir.), cert. denied, 488 U.S. 941 (1988).

Normally, the court must assume that the objectives stated by the legislature are the actual purposes of the challenged statute, unless the circumstances force the court to conclude that they could not have been. Norfolk, 822 F.2d at 403. However Act 8 has no incorporated statement of purpose.

However, the court is entitled to "hypothesize motivations of a state legislature in order to find a legitimate objective promoted by the provision under attack." Kentucky W. Va. Gas

Co., 837 F.2d at 616. The Commonwealth does have a credible local interest in protecting the welfare of its citizens against illegal conduct in connection with the placing of bets in other-state lotteries. Other-state lotteries themselves are undoubtedly regulated, alleviating this concern with regard to the lotteries themselves. However, because of federal law, Pennsylvania citizens playing such lotteries must utilize middlemen. It is easily conceivable that fraud and theft could occur in connection with Pic-A-State's type of business that the Commonwealth has an interest in preventing, just as it strives to protect against similar activity in the sale of tickets to its own lottery.[16] Another hypothetical purpose of the Commonwealth could be to prevent businesses such as Pic-A-State from competing with the Pennsylvania Lottery for the disposable income Pennsylvania citizens allocate toward lotteries. While this appears at first glance to be pure economic protectionism, in reality it is a mixed motivation, as all of the Lottery profits fund property tax relief and free and reduced fare transit for the elderly of Pennsylvania. The State might realistically be concerned that such sales could endanger the interests of its older citizens.

The available evidence on intent indicates that all three motivations hypothesized by the court above may have been operative: (1) the explicitly stated purpose[17] in the original State Lottery Law, which was amended by Act 8, is to provide funds for property tax and transit relief for senior citizens and provide a means to curb illegal gambling in Pennsylvania; (2) a press release from the governor's office asserts a concern for the

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16. See, e.g., 72 Pa.Stat.Ann. § 3761-7 (Lottery sales agents; qualifications; prohibitions); 72 Pa.Stat.Ann. § 3661-9 (Sales of tickets in excess of regulated price; sales by unlicensed persons).

17. See 72 Pa.Stat.Ann. § 3761-2.

protection of the Lottery and senior citizens from the approximately $ 1 million drainage in sales resulting from the taking of orders for other state lottery tickets (see Ex. D, Compl.); and (3) deposition testimony of Mr. Schreiber, director of public relations for the Pennsylvania Lottery, addressed a Lottery-commissioned study which showed that, while the Pennsylvania Lottery overall had growing proceeds, agents who both sold Pennsylvania tickets and took orders for out-of-state lottery tickets showed a decrease in Pennsylvania sales (Schreiber Dep. at 16-20, 25, 29, & Ex. 2).[18] Assuming all three are valid indicators of the law's intent,[19] less discriminatory alternatives exist for their accomplishment.

D. Alternatives

It is clear that the accomplishment of the legislative purpose argued by the Commonwealth, one concerned with fraud and theft by middlemen such as Pic-A-State and its agents, does not depend on the complete barring of their businesses. Rather, such a concern could be met through a less discriminatory alternative such as comprehensive regulation of the sort now imposed on the

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18. The court does not consider the two newspaper articles attached to the Schreiber deposition at Ex. 1 and Ex. 4 to be helpful on the issue of purpose, other than to indicate the State desired to put concerns such as Pic-A-State's out of business.

19. Although floor remarks are not binding to indicate intent, the remarks made on the floors of both houses do support the existence of all three possible concerns cited by the court. See, e.g., Pl.Ex. 2, House Floor Record, at lines 488-95 (economic), 538-48 (elderly), 578-84 (elderly), 626-33 (economic); Senate Floor Record of April 28, 1993, deemed Defs. Ex. 3, at 10 (Dawida, elderly), 11 (Lincoln, economic), 12 (Andrezeski, public welfare), 13 (Stewart, re/public welfare).

sellers of Pennsylvania lottery tickets, in which the sellers must demonstrate financial responsibility and security, must have a record clear of various criminal activities, may be examined with regard to character, experience and fitness consistent with the public interest and may not sell a ticket at a cost greater than the regulated price. See 72 Pa.Stat.Ann. §§ 3761-7, 3761-9. Assuming that a concern for raising revenue for the elderly is proper, the proposition that revenue has been lost, that those citizens ordering tickets through Pic-A-State would otherwise be purchasing Pennsylvania lottery tickets, remains somewhat speculative to this court. Even if it were not speculative, it could be met by charging a fee for each Pic-A-State transaction, so that the elderly would benefit just as they do for a Commonwealth transaction.[20]

Moreover, Defendants have not seriously attempted to argue that the existence of the reciprocity agreement provision of Act 8 is in any way curative of any Commerce Clause defects in the Act, except for their speculative contention at oral argument that this might be an avenue for the Commonwealth to regulate other states' lotteries.[21] This reticence is wise, as the

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20. The court finds disingenuous Defendants' argument that they cannot regulate the actual lotteries of other states. Other state lotteries are undoubtedly very well-regulated and there is no reason to believe such regulation would be inadequate to protect the interests of Pennsylvania citizens. The realistic and more predictable concern is with the gap of time and space between the request to bet and the time the ticket is purchased in the other state, (see, e.g., newsclippings provided by Defendants, at court request, and now deemed Defs. Ex. 4, regarding a messenger service which purportedly sold the winning ticket in a California lottery twice); there is no indication that the nondiscriminatory alternative of regulation would be inadequate to address this.

21. As the court has earlier stated, the court does not consider the actual regulation of other states' lotteries to be a necessary, proper Commonwealth concern.

provision of such reciprocal agreements as an alternative to improper discrimination against interstate commerce has been regularly struck down by the United States Supreme Court. See, e.g., New Energy Co. v. Limbach, 486 U.S. 269, 274-76 (1988).

Given the foregoing, the court concludes that Section 9(C) and Section 9.1 of Act 8 of 1993 are unconstitutional, as violative of the dormant Commerce Clause.[22] Given this conclusion, Plaintiffs' other arguments need not be addressed. An appropriate order will be issued.

FINAL ORDER AND JUDGMENT

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Commonwealth of Pennsylvania and the Commonwealth Department of Revenue are dismissed as named Defendants pursuant to the Eleventh Amendment.

2. Judgment is entered in favor of Plaintiffs and against Defendant on the federal Commerce Clause claim.

3. As explained in the memorandum issued this date, Section 9(C) and Section 9.1 of Commonwealth Act 8 of 1993 are violative of the dormant Commerce Clause. As such, they are unconstitutional and their enforcement is permanently enjoined.

4. No indictments or prosecutions under Section 9(C) of

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22. None of the parties have challenged the remaining portions of Act 8 or commented on whether they are properly severable from the two provisions which this court finds violative of the Commerce Clause.

Appendix C

Act 8 of 1993 shall be made in the name of the Commonwealth of Pennsylvania.

5. The Clerk of Court is directed to close the file.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED NOVEMBER 30, 1994 (*PIC-A-STATE PA, INC. v. PENNSYLVANIA*, 42 F.3d 175 (3d CIR.) (*PIC-A-STATE I*))

PIC-A-STATE PA, INC.; Zack's Frozen Yogurt; Smitty's Place, Inc.; K & J Stationary, Inc.; James Russell

v.

COMMONWEALTH OF PENNSYLVANIA, Department of Revenue; Eileen H. McNulty Eileen H. McNulty, Appellant.

No. 94-7056.

United States Court of Appeals, Third Circuit.

Argued Sept. 14, 1994.

Decided Nov. 30, 1994.

Pennsylvania corporation brought action alleging that Pennsylvania act proscribing sale within state of interest in another state's lottery violated commerce clause. The United States District Court for the Middle District of Pennsylvania, Sylvia H. Rambo, Chief Judge, declared act unconstitutional, and enjoined its enforcement. Secretary of Pennsylvania Department of Revenue appealed. The Court of Appeals, Alarcon, Circuit Judge, sitting by designation, held that: (1) application of federal Crime Control Act, enacted while instant litigation was pending, in assessing constitutionality of Pennsylvania act would not be manifestly unjust, as there would

be no retroactive effect on plaintiff's past conduct; (2) Crime Control Act did not preempt Pennsylvania act; and (3) Pennsylvania act complimented Crime Control Act and, thus, did not violate dormant commerce clause.

Reversed.

* * *

Michael A. Finio (argued), Goldberg, Katzman & Shipman, Harrisburg, PA, for appellees.

Ernest D. Preate, Jr., Atty. Gen., Anne K. Fiorenza (argued), Deputy Atty. Gen., Calvin R. Koons, Sr. Deputy Atty. Gen., John G. Knorr, III, Chief Deputy Atty. Gen., Chief, Litigation Section, Office of Atty. Gen. of Pennsylvania, Harrisburg, PA, for appellant.

Deborah T. Poritz, Atty. Gen. of New Jersey (Joseph L. Yannotti, Asst. Atty. Gen., Patricia A. Kern, B. Stephan Finkel, Deputy Attys. Gen., Trenton, NJ, of counsel), for amicus curiae, State of N.J.

Hillary Richard, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C. (Daniel R. Williams, New York City, of counsel), for amicus curiae, C.H.A.N.C.E.

Lee Fisher, Atty. Gen. of Ohio, Jay M. Patterson, Sheryl C. Maxfield, Daniel A. Malkoff, Chester T. Lyman, Jr., Asst. Attys. Gen. (Richard A. Cordray, Simon B. Karas, Asst. Attys. Gen., Columbus, OH, of counsel), for amicus curiae, States of Ohio, Ariz., Cal., Conn., Del., Fla., Gal, Idaho, Ill., Iowa, Kan., Ky.,

Appendix D

La., Md., Mass., Minn., Mo., Mont., Neb., Nev., N.H., N.Y., R.I., S.C., S.D., Utah, Tex., Vt., Va., Wash. D.C., W.Va. and Wisc.

Before: STAPLETON, LEWIS and ALARCON, *Circuit Judges.

OPINION OF THE COURT

ALARCON, Circuit Judge:

Eileen McNulty, Secretary of the Pennsylvania Department of Revenue, appeals from the district court's declaration that section 9(c) and 9.1 of Pennsylvania's Commonwealth Act 8 of 1993 ("Act 8") is unconstitutional under the Commerce Clause and the order permanently enjoining its enforcement. We must decide whether Act 8 imposes an unconstitutional burden on interstate commerce in violation of the dormant Commerce Clause. We reverse because we conclude that since the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 ("1994 Crime Control Act"), makes the conduct of a business that sells an interest in another state's lottery a federal crime, Act 8 does not impose an unconstitutional burden on interstate commerce.

I.

Pic-A-State PA., Inc. ("Pic-A-State"), a Pennsylvania corporation, characterizes itself as a "messenger business . . . [operated] as a service to Pennsylvania citizens . . . where orders are received from persons who wish to participate in legalized and authorized lotteries of other states." Pic-A-State conducts its business in Pennsylvania through retail stores, at which

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

customers place orders for lottery tickets from other states. The retail stores transmit the orders to purchasing agents in other states. The retail stores charge the customers one dollar for each lottery ticket purchased. The purchaser does not receive a ticket for his money. Instead, the purchaser receives a receipt showing the numbers he selected.

In response to Pic-A-State's business activities in Pennsylvania, that state's legislature enacted Commonwealth Act 8 of 1993. Section 9(c) of Act 8 provides:

> Except as provided in this act, no person shall engage in the sale or offering for sale within this Commonwealth of any interest in a lottery of another state or government whether or not such interest is an actual lottery ticket, receipt, contingent promise to pay, order to purchase or other record of such interest.

Pa.Stat.Ann. tit. 72, § 3761-9(c) (Supp.1994). Section 9(d) provides that "[a]ny person convicted of violating this section shall be guilty of a misdemeanor and upon conviction thereof, shall be sentenced to pay a fine not exceeding two thousand dollars ($2,000)." Pa.Stat.Ann. tit. 72, § 3761-9(d) (Supp.1994). Section 9.1 of Act 8 directs "[t]he secretary [to] enter into a compact with any other states that permit sale of Pennsylvania lottery tickets within their borders to sell those states' lottery tickets within this Commonwealth." Pa.Stat.Ann. tit. 72, § 3761-9.1 (Supp.1994). Act 8 was signed into law on May 20, 1993.

Anticipating that Act 8 would render its business illegal in Pennsylvania, Pic-A-State filed a complaint in the United States

District Court for the Middle District of Pennsylvania on June 1, 1993, alleging, inter alia, that Act 8 violates the Commerce Clause. Pic-A-State requested that the district court (1) issue a stay of the July 19, 1993 effective date of Act 8 pending resolution of this matter, (2) declare that Act 8 violates the Commerce Clause of the United States Constitution, and (3) issue an injunction prohibiting the enforcement of Act 8.

The district court consolidated the proceedings for a preliminary and permanent injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure[1] and ordered that the matter be tried on July 9, 1993. The parties filed briefs and the district court heard oral argument on July 9, 1993. On July 15, 1993 the district court issued a stay barring indictments or prosecutions under Act 8 pending the entry of its final order and judgment.

On July 23, 1993, the district court entered an order declaring sections 9(c) and 9.1 of Act 8 unconstitutional and permanently enjoining their enforcement. The district court also filed a memorandum decision setting forth its rationale. It concluded that Act 8 was unconstitutional under the Commerce Clause because it placed an impermissibly discriminatory burden on interstate commerce. The court noted that because Act 8 facially discriminates against interstate commerce, it was subject to heightened scrutiny pursuant to Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 398 (3d Cir. 1987) ("[S]tate actions that purposefully . . . discriminate against interstate

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1. Rule 65(a)(2) provides, in pertinent part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed.R.Civ.P. 65(a)(2).

commerce . . . are given heightened scrutiny."). The district court determined that the state's purpose in enacting Act 8 was to control fraud and theft in out-of-state lottery sales, and protect the interests of the state's senior citizens who benefit from the profits realized from the sale of Pennsylvania lottery tickets. The district court concluded that Act 8 could not withstand heightened scrutiny because the state could enact less discriminatory regulation to accomplish its goals. Secretary McNulty filed a timely appeal from the district court's order.

Prior to the date scheduled for the oral argument of this matter before this court, Congress enacted the 1994 Crime Control Act on August 25, 1994. The 1994 Crime Control Act was signed into law on September 13, 1994. One portion of the 1994 Crime Control Act makes it a federal crime knowingly to transmit in interstate commerce information for the purpose of procuring interests in an out-of-state lottery if one is "engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery . . . conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States)." Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103322, § 320905, 108 Stat. 1796, 2126. In resolving the issues raised in this appeal, we must assess the effect the 1994 Crime Control Act has upon the constitutionality of Act 8. "Our standard of review is plenary." Juzwin v. Asbestos Corp., 900 F.2d 686, 689 (3d Cir.), cert. denied, 498 U.S. 896, 111 S.Ct. 246, 112 L.Ed.2d 204 (1990).

II.

As an initial matter, Pic-A-State argues that it would be manifestly unjust for this court to apply the 1994 Crime Control

Act in assessing the constitutionality of Act 8. Supp. Letter Memo. at 35. In support of this argument, Pic-A-State relies upon a line of Supreme Court cases addressing the question whether a newly-enacted law should be retroactively applied to matters pending on appeal. Pic-A-State's reliance on this principle of retroactivity law is misplaced because a determination by this court will not have a retroactive effect on Pic-A-State's past conduct.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." Landgraf v. USI Film Prods., __ U.S. __, __, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994) (citation omitted). Rather, we "must ask whether the new provision attaches new legal consequences to events completed before its enactment." Id.

In the matter before us, application of the 1994 Crime Control Act to the issue presented to this court attaches no new legal consequences to the activity engaged in by Pic-A-State prior to the enactment of the 1994 Crime Control Act. In its complaint, Pic-A-State sought an injunction to bar the prospective enforcement of Act 8 following its July 19, 1993 effective date. As the Supreme Court has noted, "relief by injunction operates in futuro." Id. at __, 114 S.Ct. at 1501 (internal quotation omitted). "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Id. Accordingly, we must consider the impact of the 1994 Crime Control Act on the constitutionality of Act 8.

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III.

During oral argument before this court, Pic-A-State stated "it appears, upon our initial analysis, that the [1994 Crime Control Act] pre-empt[s] the field and . . . may be another way to affirm the district court." We disagree.

The "ultimate touchstone" of pre-emption analysis is the congressional intent underlying a statute. Cipollone v. Liggett Group, Inc., __ U.S. __, __, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (internal quotation omitted). As the Supreme Court explained,

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Id. (citations and internal quotation omitted). An examination of the 1994 Crime Control Act demonstrates that it does not pre-empt Act 8.

In amending 18 U.S.C. § 1301, Congress did not explicitly state that its intention was to pre-empt any state legislation. Moreover, Act 8 is not in conflict with the 1994 Crime Control Act. As amended, section 1301 prohibits the business of procuring for persons in one state an interest in a lottery conducted in another state. Act 8 also proscribes the sale within

the state of Pennsylvania of an interest in another state's lottery. The crime defined in Act 8 is totally consistent with the conduct prohibited by the 1994 Crime Control Act.

Contrary to Pic-A-State's contention, Congress has not indicated an intention to preclude all state legislation concerning the interstate sale of an interest in a lottery. Rather, the 1994 Crime Control Act expressly authorizes interstate compacts regarding the sale of interests in out-of-state lotteries. Accordingly, we must reject Pic-A-State's contention that the 1994 Crime Control Act preempts Act 8.

IV.

The purpose of the Commerce Clause is to protect the national interest in facilitating commerce between the states and with foreign nations. To implement this purpose, the Commerce Clause gives Congress the authority to define the national interest. The Supreme Court has implemented this purpose with a number of Commerce Clause doctrines:

(a) Where Congress has acted in a particular area of interstate commerce, inconsistent state regulation is barred, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 155-56, 62 S.Ct. 491, 495-96, 86 L.Ed. 754 (1942) (collecting cases);

(b) Where Congress has acted to pre-empt state regulation of a particular area of interstate commerce, state regulation, consistent or inconsistent, is precluded, Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (inconsistent food labeling requirements); Pennsylvania v. Nelson, 350 U.S. 497, 502, 76 S.Ct. 477, 480, 100 L.Ed. 640 (1956) (striking down a consistent state sedition law that would

hamper federal enforcement at a time when the federal government had chosen to occupy the field); Southern Ry. Co. v. Reid, 222 U.S. 424, 440, 32 S.Ct. 140, 143-44, 56 L.Ed. 257 (1912) (ratemaking and regulation of interstate transportation of goods by rail service);

(c) Even where Congress has not acted, there are areas where the national interest in uniformity is so important that no state regulation is permitted, Leisy v. Hardin, 135 U.S. 100, 119, 10 S.Ct. 681, 687-88, 34 L.Ed. 128 (1890) (importation of intoxicating liquors); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 315, 13 L.Ed. 996 (1851) (regulation of navigable waters); and

(d) Even where Congress has not acted to regulate a particular area of interstate commerce, states are precluded by the "dormant Commerce Clause" from enacting regulation that discriminates against interstate commerce or unduly burdens that commerce, Maine v. Taylor, 477 U.S. 131, 151-52, 106 S.Ct. 2440, 2454, 91 L.Ed.2d 110 (1986) (upholding state ban on importation of fish bait where necessary to protect the public health); Sporhase v. Nebraska, 458 U.S. 941, 954, 102 S.Ct. 3456, 3463, 73 L.Ed.2d 1254 (1982) (finding reciprocity agreement in state ground water regulation unconstitutional because it imposes a burden on interstate commerce that outweighs any local interests served), unless such discrimination is expressly authorized by Congress, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 431, 66 S.Ct. 1142, 1155-56, 90 L.Ed. 1342 (1946) (holding that the McCarran Act expressly authorizes states to regulate and tax the business of insurance, even where such regulation and taxation might burden interstate commerce); Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 174, 105 S.Ct. 2545, 2553-54, 86 L.Ed.2d 112 (1985)

(holding that federal law authorized states to decide whether to allow in-state banks to be purchased by out-of-state holding companies).

Where Congress has proscribed certain interstate commerce, Congress has determined that that commerce is not in the national interest. Where such a determination has been made by Congress, it does not offend the purpose of the Commerce Clause for states to discriminate or burden that commerce. As a result, in those instances where Commerce Clause challenges to state regulation have been mounted in an area where Congress has made it a crime to conduct such commerce, the courts have conducted only a two-fold inquiry, asking (1) whether federal law precludes all state legislation in that area, and (2) if state regulation is not precluded, whether the state statute conflicts with the federal provision. California v. Zook, 336 U.S. 725, 733, 69 S.Ct. 841, 845, 93 L.Ed. 1005 (1949); Asbell v. Kansas, 209 U.S. 251, 255-56, 28 S.Ct. 485, 486, 52 L.Ed. 778 (1908) (upholding state cattle inspection requirements which did not conflict with existing federal requirements). In situations much like that before us, the Supreme Court has sustained the validity of state statutes found to be consistent with the federal criminal proscription.

In California v. Zook, the Supreme Court was faced with a Commerce Clause challenge to a California statute that made it a crime to sell or arrange transportation over the state's public highways with carriers that did not hold a permit from the Interstate Commerce Commission. Zook, 336 U.S. at 726 & n. 1, 69 S.Ct. at 842 & n. 1. The federal Motor Carrier Act contained a similar prohibition with regard to carriers operating in interstate commerce. Id. at 726-27 & n. 2, 69 S.Ct. at 842 & n. 2. After enunciating the principles of the dormant Commerce

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Clause applicable when Congress has failed to act, the Court stated:

> There is no longer any question that Congress can redefine the areas of local and national predominance. . . . When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition. . . . But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the state action conflict with national policy? The [rules applicable when Congress has not acted], the question of congressional "occupation of the field," and the search for conflict in the very terms of state and federal statutes are but three separate particularizations of this initial principle.

Id. at 728-29, 69 S.Ct. at 843 (citations omitted). The Court then resoundingly rejected the rule urged upon it by the respondents, "that when Congress has made specified activity unlawful, . . . state laws 'aiding' enforcement are invalid." Id. at 729, 69 S.Ct. at 843; see also Taylor v. State, 516 P.2d 1351, 1354 (Okla.Crim.App. 1973) (upholding state pandering law where its prohibition on procuring women for transportation for immoral purposes is consistent with the Mann Act's ban on the interstate transportation of women for such purposes). The touchstone of the test is whether the state prohibition conflicts with the scope of the federal law. This has been the general principle expressed for state legislation governing prostitution,[2]

2. In accordance with the well-settled principle that, in the event of (Cont'd)

monopolies,[3] and lotteries.[4] By amending 18 U.S.C. § 1301, Congress prohibited the interstate sale of lottery interests. Act 8 complements the federal statute by prohibiting the sale of lottery interests within the borders of the Commonwealth of Pennsylvania. Accordingly, we conclude that Act 8 does not violate the dormant Commerce Clause. The judgment of the district court will be reversed.

(Cont'd)
conflict between federal legislation regulating interstate commerce and a state statute, the federal legislation prevails and the state legislation is of no effect insofar as it impinges upon the field of interstate commerce occupied by the federal enactment, state legislation relating to the transportation of females for purposes of immorality is valid only insofar as it does not conflict with federal legislation on the subject. 63 Am.Jur.2d Prostitution § 22, at 365 (1984) (footnotes omitted).

3. "[T]he fact that Congress has acted to prevent restraints on trade in interstate commerce does not necessarily invalidate state legislation effecting substantially the same result, and the fundamental inquiry in such instances is whether the state legislation is in conflict with the national policy." 15 C.J.S. Commerce § 133, at 869 (1967).

4. A gambling transaction involving an instrumentality of interstate commerce appears to be the subject of both federal and state regulation or prohibition, if there is no conflict between the state and federal legislation on the subject. Lottery tickets are the subjects of commerce insofar as the carriage of such tickets from one state to another is interstate commerce which Congress may prohibit. 38 Am.Jur.3d Gambling § 11 (1968) (citing The Lottery Case (Champion v. Ames), 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903) (rejecting a Commerce Clause challenge to the federal lottery ban)).

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA FILED FEBRUARY 23, 1995 (*PIC-A-STATE PA, INC. v. RENO*, NO. 1:CV-94-1490, SLIP OP. (M.D. Pa. FEB. 23, 1995) (*PIC-A-STATE DISTRICT II*)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-94-1490

(Rambo, C.J.)

PIC-A-STATE PA., INC. and SCOTT McLEAN,

Plaintiffs

v.

JANET RENO, in her official capacity as Attorney General of the United States of America; THE UNITED STATES DEPARTMENT OF JUSTICE; and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM

I. *Introduction*

Before the court for disposition are the Plaintiffs' application for injunctive and declaratory relief and motion for summary judgment, and Defendants' motions to dismiss the complaint and to vacate the temporary injunction entered in this matter. The various motions and supporting briefs all stem from Plaintiffs' challenge to the 1994 Interstate Wagering

amendment, enacted as part of the Crime Control Act and codified at 18 U.S.C. § 1301, *as amended*. The challenged provision prohibits the transmission in interstate commerce of any information used to procure the sale or purchase in one state of any interest in another state's lottery. Plaintiffs seek a permanent injunction against enforcement of the amendment on the grounds that it is unconstitutional. For the reasons set forth below, the court will deny Plaintiffs' request for injunctive relief and grant Defendants' motions to dismiss and to vacate the temporary injunction.

II. *Background*

Pic-A-State PA, Inc. ("Pic-A-State") is a Pennsylvania corporation with its principal place of business in New Jersey. Scott McLean is Pic-A-State's owner. Pic-A-State is engaged in the business of taking orders in Pennsylvania for lottery tickets for the authorized lotteries of other states. Upon a customer's placement of a ticket order for an out-of-state lottery ticket, a Pic-A-State agent transmits the information through a computer terminal to purchasing agents in the other state. These out-of-state purchasing agents actually purchase the ticket directly from authorized lottery agents of their state, and hold the ticket in that state. Meanwhile, the Pic-A-State agent in Pennsylvania provides the customer with a receipt bearing the numbers that the customer has requested to be played. The Pennsylvania customer does not receive the actual lottery ticket, which, as noted, remains in the custody of the out-of-state agents. Pic-A-State makes its profits by charging a fee of $1.00 for each lottery ticket order placed.

On September 13, 1994, the President signed into law the Interstate Wagering provision challenged in this action, which

now renders Pic-A-State's business activity illegal. On September 16, 1994, Plaintiffs instituted this action, seeking to enjoin enforcement of the provision and obtain a declaration that it violates the Untied States Constitution in numerous respects. On the same day, this court held an in-chambers conference with counsel for the Plaintiffs and Defendants. As a result of the conference and subsequent communications with the parties, the court understood that no factual development or presentation would be required for disposition of the matter. The court granted temporary injunctive relief, and set a schedule to allow the parties to present legal memoranda, contemplating a ruling on the issues as a matter of law without a hearing.

At the time the instant action was commenced, the Third Circuit Court of Appeals was poised to issue its decision in the pending appeal of *Pic-A-State Pa Inc., et al. v. McNulty*, Civil Action No. 1: CV-93-0814 ("*Pic-A-State I*"). In *Pic-A-State I*, this court had held that the Commonwealth's Act 8 of 1993, which prohibited the sale in Pennsylvania of any out-of-state lottery interests, violated the dormant Commerce Clause of the United States Constitution. The Third Circuit had heard oral argument in that appeal only two days prior to the Plaintiffs' filing of the instant action. It had come to this court's attention that the parties had addressed the effect of the Interstate Wagering amendment on the constitutionality of Act 8. Accordingly, there was a distinct possibility that the Third Circuit would address, directly or in *dicta*, the constitutionality of the federal statute.

At approximately the same time the briefing period in the instant case drew to a close, the Third Circuit issued its opinion and order in *Pic-A-State I*, *see* 42 F.3d 175 (3d Cir. 1994). The Third Circuit reversed this court's order, essentially on the

grounds that Congress' intervening enactment of the Interstate Wagering provision laid to rest any concerns about a dormant Commerce Clause violation. The Third Circuit also held that Act 8 complemented, rather than conflicted with the federal provision, and so was not preempted. *See id.* at 178-80. The *Pic-A-State I* plaintiffs immediately filed a petition for panel rehearing or other relief, which again raised the possibility that the Third Circuit would address the Interstate Wagering provision. The Third Circuit denied rehearing on January 24, 1995 and, shortly thereafter, issued the mandate in that case.

As it turned out, the Third Circuit did not comment directly on the constitutionality of the Interstate Wagering provision in disposing of the appeal in *Pic-A-State I*, although it certainly seems to have assumed it. In any case, this assumption does not relieve the court of its obligation to rule on this question and, accordingly, the court now will address Plaintiffs' constitutional challenges to the provision.

III. *Discussion*

There has long been a federal ban on the transportation or carrying in interstate commerce of lottery tickets, receipts, advertising, and similar lottery-related materials. *See generally United States v Edge Broadcasting Co.*, __ U.S. __, 113 S.Ct. 2696, 61 U.S.L.W. 4759 (1993). Of course, prior to the enactment of the challenged provision, Plaintiffs' business activities were not violative of federal law, because under its computer-aided arrangement, no lottery ticket, receipt, or other paper representing the ticket or interest in the lottery was carried crossed state lines. The Interstate Wagering amendment, however, reached Pic-A-States' business activities by making it a crime for a person or entity engaged in:

> the business of procuring for a person in 1 State . . . a ticket, chance, share, or interest in a lottery, gift enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), [to] knowingly transmit [ ] in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest. . . .

18 U.S.C. § 1301 (as amended).

Plaintiffs' complaint asserts that the provision violates the Commerce Clause, the First, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, and the federal antitrust laws. The court has reviewed with care the briefs and exhibits submitted by Plaintiffs, and the case law cited therein. Plaintiffs' challenge is based primarily upon the Commerce Clause, and that challenge will be addressed first.

Plaintiffs are burdened with overcoming a substantial body of precedent that weighs against the prospect of success in this challenge. Indeed, regardless of Plaintiffs' or this court's view of the wisdom or fairness of government regulation of lottery activities, the United States Supreme Court has consistently recognized and upheld the power of states and the Congress to regulate activities involving lotteries. *See Ex Parte Jackson*, 96 U.S. 727 (1878); *In re Rapier*, 343 U.S. 110 (1892); *Champion v. Ames*, 188 U.S. 321 (1903); *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 289-90 (1953): *United States v. Fabrizio*, 385 U.S. 263 (1966); *United States v. Edge Broadcasting Co., supra.*

More particularly, the Supreme Court has consistently recognized that: (1) the transportation of materials involving lotteries from one state to another for profit is interstate commerce: (2) Congress does not exceed its power under the Commerce Clause in regulating such activities; and (3) that in regulating lotteries, federal laws serve the valid purpose of assisting states in their efforts to regulate intrastate lottery activities. *Champion v. Ames, supra*; *United States v. Fabrizio*, 385 U.S. at 269; *United States v. Edge Broadcasting Co.*, 61 U.S.L.W. at 4760.

In the face of this Supreme Court precedent, Plaintiffs submit that the genuine reason for Congress' enactment of the Interstate Wagering amendment was to insulate states from competition in the lottery business, and that it was spurred by this court's decision in *Pic-A-State I*. The heart of Plaintiffs' legal argument is that Congress has misused its power under the Commerce Clause because the basis for lottery regulation, a belief that it is a social evil that is injurious to the public morality, no longer exists. Plaintiffs urge that because Congress has not enunciated a new foundation for regulation in this area, such regulation is invalid. Although it is apparent that the introduction and passage of the Interstate Wagering amendment was spurred by this court's decision in *Pic-A-State I*, the court is constrained to disagree with Defendants on the other points.

As both parties recognize, state governments historically regarded lotteries as potentially injurious, and either banned or closely regulated them, often with the help of Congress. *United States v. Edge Broadcasting Co.*, 61 U.S.L.W. at 4760. It is important to recognize that, although the harsh moral view of lotteries has softened in many (but not all) states over time, this has coincided with the states' decisions to utilize lotteries as a

means of raising revenues to be used for the public good. *Unregulated* forms of gambling, including lotteries, were and continue to be regarded as harmful, not least because of the propensity of criminal elements to enter the arena. Congress and the Supreme Court long ago signalled adherence to this view and there has been no retreat from it, as evidenced by a continuous line of precedent, from the 1903 decision in *Champion v. Ames*, to the 1993 decision in *Edge Broadcasting Co., supra*.

By enacting the Interstate Wagering amendment, Congress closed the last loophole to private interstate lottery business dealings, building on the very statutory scheme that has long been held to be a valid exercise of Congressional authority under the Commerce Clause. In doing so, Congress continues in its long-standing role of assisting states in their effort to control lottery activities, while acquiescing to states' rights to permit interstate lottery compacts, if they so choose. Thus, the court cannot agree with Plaintiffs that the legal and constitutional foundation for federal regulation of lotteries has crumbled. Reasonable minds may differ on the wisdom of particular regulation. Nonetheless, it is this court that is without foundation to require Congress to express a new justification for continuing to regulate in this area, even though one purpose or, at least, consequence of Congress' regulation is that only states and their authorized agents will make profits from the sale of lottery tickets.

The court is not persuaded by Plaintiffs' argument that *Francis v. United States*, 188 U.S. 375 (1903), provides a basis for ruling in their favor. In *Francis*, the Supreme Court considered § 1301's predecessor statute, which made it a crime, *inter alia*, to carry in interstate commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance,

share, or interest in a lottery. At issue was whether slips of paper retained by a lottery agent, which contained the notations of the numbers selected by the ticket purchaser, fell within the prohibitions of the statute. The Supreme Court held that they did not, because they were not representative of the purchaser's title to the lottery ticket or winnings. *Francis*, 188 U.S. at 377-78. In 1961, Congress enacted a statutory provision that brought such slips within the federal lottery prohibitions, effectively extinguishing the viability of *Francis*, and the Supreme Court upheld the constitutionality of that provision. *See United States v. Fabrizio*, 385 U.S. at 269. Pic-A-State was apparently aware of *Francis* and its consequences, because it declined in the course of its business to transport over state lines any slip or other representation of a ticket purchaser's participation in the lottery. Thus, the court does not understand how *Francis* advances Plaintiffs' position in this matter.

For this court to hold that Congress' justification for regulating interstate lottery activities is obsolete and, thus, the Interstate Wagering provision is unconstitutional, it would have to disregard a long line of Supreme Court precedent. The Supreme Court may wish at some point to reconsider its own precedent in this area in light of changing mores. It simply is not within the province of this court to do so.

Plaintiffs, along with *amicus curiae* C.H.A.N.C.E., also urge that the 1994 Interstate Wagering provision violates the First Amendment because it inhibits commercial speech. One quite circular argument advanced under this theory is that Pic-A-Statet's commercial advertisements would not be unlawful were it not for the Interstate Wagering provision and, therefore, the provision violates the First Amendment right to engage in commercial speech. The broader argument raised by Plaintiffs and *amicus curiae*, however, is that the prohibition on the

interstate transmission of any lottery-related business "information" is a prohibition against commercial speech.

As a threshold matter, the court notes that, faced with First Amendment challenges, the Supreme Court consistently has upheld laws of Congress that ban or limit advertising or dissemination of materials related to the business of lotteries, when federal concerns are involved, such as the postal service or the Commerce Clause. *Ex Parte Jackson*; *Ex Parte Rapier*; *United States v. Edge Broadcasting Co., supra.* To the extent that Plaintiffs' arguments are addressed to actual advertising of out-of-state lotteries within a state's borders, or through the mails, or by transmitting or transporting advertising information across state lines, the court believes that the prior Supreme Court rulings settle the matter squarely in the federal government's favor and against Plaintiffs' First Amendment challenge.

Plaintiffs, however, primarily base the First Amendment challenge to the notion that the "information" used in placing lottery orders across state lines is commercial speech. This does not appear to be a form of commercial speech, as defined by the Supreme Court. As noted in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 556 (1980), the First Amendment's concern for commercial speech is based on the informational function of advertising. *Id.* at 563 (citation omitted). Accordingly, as the Court explained, there can be no constitutional objection to the suppression of commercial messages that do not give accurate information to the public about lawful activity. *Id.* For the sake of thoroughness, however, the court will assume that the "information" transmitted by Pic-A-State is commercial speech, and apply the four-part test provided in *Central Hudson* to aid courts in evaluating First Amendment challenges to limits on commercial speech.

Appendix E

The first prong of *Central Hudson*'s test requires courts to determine whether the expression is protected by the First Amendment at all, which, in turn, requires a threshold finding that the speech at least concerns lawful activity and is not misleading. Provided that inquiry is answered affirmatively, courts are to ask next whether the asserted governmental interest in prohibiting or limiting the speech is substantial. If these first two inquiries are answered in the affirmative, courts must then determine whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than necessary to serve the asserted interest. *Central Hudson*, 447 U.S. at 566.

In this case, the inquiry ends with the threshold question: Is the expression protected by the First Amendment at all? The answer to that question must be no because the "expression" involved, the interstate transmission of information used to procure or place lottery ticket sales, is unlawful in light of 18 U.S.C. § 1301 and its 1994 amendment. Although Plaintiffs would turn this analysis on its head by assuming the lottery itself, rather than the transmission, is lawful, the court cannot follow suit. Plaintiffs' First Amendment challenge to the 1994 Interstate Wagering amendment must fail.

Plaintiffs advance a variety of other theories for finding the 1994 Interstate Wagering provision unconstitutional. Plaintiffs urge that the provision violates antitrust laws, is unconstitutionally vague, and violates Plaintiffs' rights to Due Process. The court knows of no precedent, and can conceive of none, for finding the federal government in violation of antitrust laws for limiting commercial activity pursuant to the Commerce Clause. Nor can the court conceive of a basis for finding the provision unconstitutionally vague. The prohibitions of the

provision are quite clear, and it is equally clear that Plaintiffsunderstand them. Finally, in the face of the long line of Supreme Court precedent recognizing the power and appropriateness of Congress' very similar regulation of interstate lottery activities, Plaintiffs' assertion that such regulation is arbitrary or irrational is difficult to understand. The remainder of Plaintiffs' constitutional challenges, based upon the Ninth Amendment and Tenth Amendments, were supported in a cursory fashion, and the court finds no merit in them.

IV. *Conclusion*

In enacting the 1994 Interstate Wagering provision, Congress acted consistently with its long-recognized power to regulate interstate commercial lottery activities under the Commerce Clause, and violated no other constitutional or statutory provision. Whether or not this court agrees with Congress' convictions in this area, it lacks a valid basis to strike down the provision. Accordingly, Plaintiffs' request for injunctive and declaratory relief and motion for summary judgment must be denied, and Plaintiffs' motions to dismiss and to vacate the temporary injunction must be granted. An appropriate order will be entered.

s/ Sylvia H. Rambo
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: February 23, 1995.

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-94-1490

(Rambo, C.J.)

PIC-A-STATE PA., INC. and SCOTT McLEAN,

Plaintiffs

v.

JANET RENO, in her official capacity as Attorney General of the United States of America; THE UNITED STATES DEPARTMENT OF JUSTICE; and THE UNITED STATES OF AMERICA,

Defendants.

ORDER

In accordance with the accompanying memorandum, **IT IS HEREBY ORDERED THAT**:

(1) Plaintiffs' application for injunctive and declaratory relief and motion for summary judgment are **DENIED**;

(2) Defendants' motion to dismiss the complaint is **GRANTED**;

(3) Defendants' motion to vacate the injunction entered in this matter is **GRANTED**;

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(4) Defendants' motion for early argument date is **MOOT**; and

(5) The Clerk Of Court is directed to close the file.

s/ Sylvia H. Rambo
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: February 23, 1995.

APPENDIX F — ADJUDICATION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED AUGUST 19, 1991 (*COMMONWEALTH v. GOEN*, NO. 218 M.D. 1991, SLIP OP. (PA. COMMW. CT. AUG. 19, 1991), *AFF'D*, NO. 81 M.D. APP. 1991 (PA. MAY 6, 1992))

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 218 M.D. 1991

COMMONWEALTH OF PENNSYLVANIA, ACTING BY ERNEST D. PREATE, JR., ATTORNEY GENERAL,

Plaintiff

v.

A. G. GOEN (SZYNALSKI), Individually and DAVID SOBEL, Individually and d/b/a "LEXUS COURIER, INC.," and SCOTT McLEAN, Individually and d/b/a "PIC-A-STATE PA., INC.;

Defendants

BEFORE: HONORABLE DAVID W. CRAIG, Presiding Judge

NOT TO BE REPORTED

ADJUDICATION BY
PRESIDENT JUDGE CRAIG FILED: August 19, 1991

The Commonwealth of Pennsylvania, by the Attorney General (the state) has brought this action in equity as plaintiff, asking this court to enjoin all of the business, activities and operations of the defendants in Pennsylvania, on the ground that those operations are illegal as violating Pennsylvania's penal laws against conducting unlawful lotteries, state lottery law,

state consumer protection laws against unfair or deceptive acts or practices, and federal laws prohibiting interstate transportation of gambling materials.

At a preliminary injunction hearing conducted on two dates, the undersigned as trial judge received testimony and exhibits presented by the state and by defendant Pic-A-State Pa., Inc. (PAS).

Although the state's evidence also is directed to activities of Lexus Courier, Inc. (Lexus), that defendant did not appear, was not represented and presented no evidence.

Of course, the governing principle is that this court will grant a preliminary injunction only when the legal rights of the party moving for a preliminary injunction is clear, the need for relief is immediate, irreparable harm is threatened, and the threat to the public interest is greater than the prospective impact upon the person enjoined. *Township of South Fayette v. Commonwealth*, 477 Pa. 574, 385 A.2d 344 (1978).

FACTS

The evidence and exhibits presented in the preliminary injunction hearing provide the basis for finding the facts.

The business of PAS is as follows: PAS describes itself as an order taker or as agent for persons in Pennsylvania who desire to participate in the officially authorized lotteries of states other than Pennsylvania.

PAS has recruited outlets in Pennsylvania, normally consisting of small retail or service business who pay PAS for the

privilege of acting as PAS outlets. In most cases, these same Pennsylvania parties are also licensed agents for the authorized Pennsylvania lottery.

The outlets deal with customers who are attracted by signs and other media, advertising opportunities for the customer to participate in lotteries legal in other states. The outlet accepts the Pennsylvania customer's order and records it on a computer terminal supplied to the outlet by PAS. The entry identifies the other-state lottery involved, the number to be played as selected by the customer (or at the customer's option, by random generation), the date and other information. From the entry in the computer, the outlet generates a receipt printed by the computer, which the outlet gives to the customer as a record of the order. The outlets transmit the information from their computer terminals to PAS purchasing agents in the various other states. PAS materials inform the Pennsylvania customers that they are giving PAS and its purchasing agents powers of attorney to act as their agent in placing orders in the other state.

The PAS purchasing agents in other states purchase lottery tickets in accordance with the orders, directly from licensed vendors in the other states. Under its current practice, since June of this year, PAS does not return the actual lottery ticket to Pennsylvania or to the customer, but retains the ticket in the state of purchase on behalf of the ordering customer, except as noted below.

If a particular number selected by a Pennsylvania customer wins in the other state, the customer fills out a PAS claim form and decides how to realize upon the winning lottery transaction. The customer may choose (1) to pick up the ticket personally in the state of purchase, (2) to have the ticket sent directly to the

customer by the other state's lottery agency, (3) to have PAS send the ticket directly to the customer or (4) to have PAS send the ticket to the other state lottery agency with instructions to send the payment check to the customer.

For its services, PAS charges the Pennsylvania customers the cost of each lottery transaction proposed plus a $1.00 service charge for each transaction, out of which the outlets receive a commission.

PAS does not purchase lottery tickets in bulk and resell them, does not itself award or generate any prize and does not send or transport any lottery ticket of another state into Pennsylvania, with the exception of winning tickets which customers request to be sent to Pennsylvania for them.

The business of Lexus is conducted in similar fashion through similar outlets. However, Lexus does not use computer terminals but has the Pennsylvania customer's information picked up by messengers to be sent to the other states, after providing a receipt to the customer. Lexus also has the actual tickets from the other states distributed in Pennsylvania to the respective outlets, to be picked up by the customers who have ordered them. Lexus makes charges on the same basis as PAS, receiving the cost of the lottery transaction plus $1.00 for the service.

ANALYSIS

The facts in this case, as stated above, are undisputed. There has been no need to resolve any conflicts as to credibility. The evidence presented by the witnesses for the state was consistent with the evidence and admissions by PAS with respect to the nature of its present operations.

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Because the legal basis adopted by the state for an injunction involves a claim of specific violation of state statutes, including criminal laws, there would be no question with respect to the availability of a preliminary injunction if Lexus or PAS are actually violating laws. Violation of specific state law in itself satisfies the concerns of irreparable harm and greater injury to the public interest needed for a preliminary injunction. *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 52 A.2d 317 (1947).

ISSUE

Therefore, the pivotal question in this case is the question of law, whether the state has established a clear right, as a matter of law, to a preliminary injunction by satisfying this court that the activities of Lexus or PAS are in violation of law. Although the state has presented a shotgun array of laws possibly pertinent, the number of laws cogently involved can be narrowed readily.

STATE LAWS

First, nothing in the evidence shows any violation, in the nature of "unfair or deceptive acts or practices" under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-2(4).

Secondly, nothing in the evidence shows any violation of the law governing the Pennsylvania lottery, the Act of August 26, 1971, P.L. 351. Its § 9, 72 P.S. § 3761-9(b) prohibits persons other than licensed lottery sales agents from selling lottery tickets. However, because that prohibition plainly refers only to Pennsylvania's own legal lottery tickets, it is not applicable here. Neither Lexus nor PAS engage in any traffic in Pennsylvania lottery tickets. The state's witnesses have not indicated that any

of the Pennsylvania outlets sold any Pennsylvania lottery tickets without being licensed; on the contrary, the state's witnesses indicated only that some of the outlets appear to be regular licensed Pennsylvania lottery sales agents.

Therefore, this court first must consider whether or not PAS and Lexus are violating the Pennsylvania Crimes Code prohibitions against the conduct of unlawful lotteries within Pennsylvania. In the Crimes Code, 18 Pa. C.S. § 5513 and § 5514 respectively establish misdemeanors of the first degree (1) by the conduct of gambling, and (2) by the use of gambling devices or engagement in pool selling or bookmaking. Because lottery transactions are involved, the more pertinent provision is the Crimes Code provision dealing specifically with lotteries, 18 Pa. C.S. § 5512, which, in its entirety, reads as follows:

§5512. Lotteries, etc.

> **(a) Status of activity.** — All unlawful lotteries or numbers games are hereby declared to be common nuisances. Every transfer of property which shall be in pursuance of any unlawful lottery or numbers game is hereby declared to be invalid and void.
>
> **(b) Offense defined.** — A person is guilty of a misdemeanor of the first degree if he:
>
> (1) sets up, or maintains, any lottery or numbers game;
>
> (2) manufactures or prints, or sells,

> exposes for sale or has in his possession with intent to sell any unlawful lottery or numbers ticket or share, or any writing, token or other device purporting or intending to entitle the holder or bearer, or any other person, to any prize to be drawn or obtained in any lottery, or numbers game; or
>
> (3) publishes any advertisement of any lottery or numbers game.
>
> . . . .
>
> **(d) Definition.**—As used in this section the term 'unlawful' means not specifically authorized by law

In view of the above statute, this court must first ask if the lotteries involved here, although lawful in their originating states, are "unlawful" in the Pennsylvania context in that they are "not specifically authorized" by Pennsylvania law.

Then, if these lotteries are unlawful when conducted in Pennsylvania, the ultimate question is whether the actions of these defendants constitute the conducting of such lotteries in this state, as distinguished from functioning solely as contractors or agents for Pennsylvania players with respect to other-state lotteries.

The definition of a lottery is well settled. For a lottery to exist, there must be (1) consideration paid for (2) a chance to win (3) a prize. *Commonwealth v. Laniewski*, 173 Pa. Superior Ct. 245 (1953).

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The other states in this case are clearly conducting lotteries. The state governments are the gambling entrepreneurs, in that, for a consideration, they take bets on what numbers will be randomly selected by chance, and they bear the cost of prizes paid to holders of the numbers selected. Most significantly, they are the ones who are conducting the lotteries because they receive, and use as public revenue, the profits generated by insuring mathematically that the total consideration received will exceed the total of prize money paid out.

There is no dispute as to the point that those lotteries are lawful under the laws of those respective states. However, an equally clear point is that the conduct of those other-state lotteries in Pennsylvania is "not specifically authorized" by Pennsylvania law, so that those lotteries are unlawful under 18 Pa.C.S. § 5512 if they are conducted here. *Commonwealth v. Betres*, 237 Pa. Superior Ct. 361, 368, 352 A.2d 495, 498 (1975)

However, straightforward examination of the facts thus far presented in this case establishes that the defendants are not the gamblers conducting a gambling enterprise in Pennsylvania or elsewhere.

The gamblers conducting the gambling enterprises which reward that conduct with profits are the other states. Defendants are not agents or employees of the gambling businesses conducted by the other states. The defendants are agents or contractors acting for the Pennsylvania *bettors* or players. These defendants make their money, not at all from the mathematical edge arranged by the gambling proprietor, but from the flat dollar fees paid by bettors to have defendants act as their messengers and service providers.

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A Pennsylvanian from Erie could ask a Philadelphia friend to journey to Camden, N.J., and place a New Jersey state lottery bet on the Erie resident's behalf. That bettor could even pay the Philadelphian for his trouble, in addition to reimbursing him for the amount of the bet. Clearly, the Philadelphian — even if he acted for a number of Pennsylvanians — would not be conducting a lottery because he is not in the gambling business; he is in the messenger business as a service.

Contrary to this analysis, the Appellate Division of the New Jersey Superior Court, in *New Jersey v. Fiola*, 242 N.J. Superior Ct. 240, 576 A.2d 338 (1990), followed by a Virginia lower court in *Virginia State Lottery Board v. Pic-A-State Virginia. Inc.* at Ch. No. 91000566-00 Henrico County, has decided that service businesses like these defendants are engaged in conducting lotteries in the state of the judicial forum and therefore are violating the laws of that state.

However, those decisions are not persuasive, nor is *State v. Western Union*, 12 N.J. 468 (1953), *app. dism.* 346 U.S. 869 (1953), because they did not confront the real question of whether the defendants there were gamblers in the gambling business, but only decided that they received and transmitted bets.

On the facts of this record, there are no placing of bets in Pennsylvania. The defendants receive orders or instructions in Pennsylvania, confirm those instructions by issuing receipts, and place the bets in the other states who are in the gambling business.

One cannot avoid wondering if legal-lottery states might be subconsciously disposed to characterize the messengers as

gamblers so that the home states are shielded in that way from competition, in a day when state governments have themselves become gambling entrepreneurs.

Whether the defendants here bring other-state lottery tickets into Pennsylvania, as Lexus does, or leave the other-states' betting symbols outside Pennsylvania, as PAS normally now does, this first look is convincing that defendants are not gamblers and they are not agents or employees of the gambler governments.

FEDERAL LAW

With respect to Federal law, the state relies upon *United States v. Stuebben*, 799 F.2d 225 (5th Cir. 1986), which held that a man in New Orleans who served Louisianans desiring to bet in the Legal Illinois State Lottery, earning for himself only a fifty-cent service fee for each bet, was in violation of 18U.S.C. § 1953, which, in pertinent part, provides:

> **§ 1953. *Interstate transportation* of wagering paraphernalia**
>
> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or for ign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall

be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) *This section shall not apply to* (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) *equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law*, or (5) the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is authorized by the laws of that foreign country. (Emphasis added.)

The Court of Appeals refused to accept the plain terms of the fourth exception in subsection (b) which states that the criminalization of interstate transportation of wagering paraphernalia does not apply to

(4) equipment, tickets, or materials used or

> *designed for use* within a State in a lottery conducted by that State acting under authority of State law . . . .

Although that exception, read literally, removes from the law's scope the interstate transportation of legal lottery materials that are *designed for use* in the authorizing state, not just those which are used within that state, and thus clearly exempts the transporting of home-state designed materials into other states, the court chose to read those terms as if the words emphasized above in this paragraph were not there, by resorting to extrinsic legislative history indicating that the exception in question was among those added to remove *intra*state activities from the scope of the section.

But the whole § 1953 in the first instance fundamentally applies only to interstate transportation, so that no express negation of *intra*state activity is needed, and the reference to "materials used ... within a State" is all that is needed to take care of the *intra*state traffic, so that the inclusion of the category of "materials ... designed for use within a State," in this exempting clause, necessarily imports an exemption as to *inter*state transportation of the lottery materials of a legalizing state .

This court is not bound by decisions of the federal courts of appeals, even as to federal questions, *Lucera v. Johns-Manville Corp*. 354 Pa. Superior Ct. 520, 512 A.2d 661 (1986), andthe approach in *Stuebben* is not persuasive.

Federal law contemplates the advertisement of legal state lotteries and interstate traffic in legal lottery materials. Although 18 USC §§ 1301-1304 prohibit importing, transporting, and mailing of lottery materials, and also the broadcasting of lottery information, 18 USC § 1307 now provides as follows:

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§ 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303 and 1304 shall not apply to —

(1) an advertisement, list of prizes or other information concerning a lottery conducted by a State acting under the authority of State law which is —

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; . . . .

. . . .

(b) The provisions of sections 1301, 1302, and 1303 [18 USCS §§ 1301, 1302, and 1303] shall not apply to the transportation or mailing —

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign

> country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

Thus federal law recognizes that advertisement of legal state lotteries will cross over the borders of the authorizing state, and that material concerning a legal state lottery may be mailed to addresses within the authorizing state.

CONCLUSION

Although later judicial examination of this question may reach a different result, the legal right of the plaintiff is very reasonably debatable, not clear, and therefore has not been established so as to warrant imposition of an injunctive constraint pending final adjudication.

Accordingly, the application for preliminary injunction will be denied and the previous interim order vacated.

s/ David W. Craig
DAVID W. CRAIG, President Judge

Appendix F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 218 M.D. 1991

COMMONWEALTH OF PENNSYLVANIA, ACTING BY ERNEST D. PREATE, JR., ATTORNEY GENERAL,

Plaintiff

v.

A. G. GOEN (SZYNALSKI), Individually and DAVID SOBEL, Individually and d/b/a "LEXUS COURIER, INC.," and SCOTT McLEAN, Individually and d/b/a "PIC-A-STATE PA., INC.,

Defendants

ORDER

NOW, August 19, 1991, pursuant to hearing in equity upon motion for preliminary injunction, and also upon consideration of motion of the Commonwealth of Pennsylvania to admit exhibits, it is hereby ORDERED as follows:

1. The motion of Plaintiff Commonwealth of Pennsylvania to admit Commonwealth Exhibits Nos. 16 and 17, not being subject to any objection, is hereby granted, and those exhibits are admitted into evidence.

2. The motion for preliminary injunction against defendants is denied, and paragraph 2 of this court's order dated August 1, 1991, is vacated.

s/ David W. Craig
DAVID W. CRAIG, President Judge

APPENDIX G — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DECIDED SEPTEMBER 21, 1992 (*COMMONWEALTH v. GOEN*, 531 PA. 329, 612 A.2d 1353 (1992))

COMMONWEALTH, Acting by Ernest D. PREATE, Jr., Attorney General, Appellant,

v.

A.G. GOEN, etc., et al., Appellees.

Supreme Court of Pennsylvania.

Argued May 6, 1992.

Decided Sept. 21, 1992.

Appeal No. 81 M.D. Appeal Dkt. 1991, from the Order of the Commonwealth Court dated August 19, 1991, at No. 218 M.D. 1991, David W. Craig, Presiding Judge.

Renardo L. Hicks, Chief Dep. Atty. Gen., for appellant.

Arthur L. Goldberg, Harrisburg, for appellees.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

ORDER

PER CURIAM.

Order of the Commonwealth Court denying a preliminary injunction sought by the Commonwealth is affirmed.

Appendix G

LARSEN and PAPADAKOS, JJ., did not participate in the consideration or decision of this case.

McDERMOTT, J., did not participate in the decision of this case.

APPENDIX H — COMPLAINT, NO. 1:CV-94-1490, M.D. PA., FOR PRELIMINARY AND PERMANENT INJUNCTIVE AND DECLARATORY RELIEF FILED SEPTEMBER 16, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1:CV-94-1490

PIC-A-STATE PA., INC., and SCOTT McLEAN,

Plaintiffs

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF JUSTICE, THE UNITED STATES OF AMERICA,

Defendants

COMPLAINT

Plaintiffs, Pic-a-State Pa., Inc. and Scott McLean (together "Pic-A-State"), by and through their counsel, Michael A. Finio, and Goldberg, Katzman & Shipman, P.C., file this Complaint for preliminary and permanent injunctive and declaratory relief, and in support thereof aver as follows:

PARTIES

1. Plaintiff, Pic-a-State Pa., Inc. ("Pic-A-State"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Pic-A-State does business in this district and throughout the Commonwealth of Pennsylvania,

and the business activities of Pic-A-State are conducted in interstate commerce.

2. Plaintiff, Scott McLean, is an adult individual whose principal place of residence is in Toms River, New Jersey. He is the owner of Pic-A-State.

3. Defendant, Janet Reno, is the Attorney General of the United States, and in such capacity is the chief law enforcement officer of the United States of America, charged with the duty to enforce federal criminal laws throughout the United States, through the United States Department of Justice and the offices of various United States Attorneys throughout the country.

4. Defendant United States Department of Justice is an agency of the United States government through which violations of federal criminal laws are prosecuted and enforced throughout the country. Defendant Reno is the head of said agency.

5. Defendant United States of America is the sovereign entity which makes laws through its legislative branch and enforces and prosecutes violations of those laws through its executive branch, Reno, and the Department of Justice.

JURISDICTION

6. This matter questions and challenges the constitutionality and enforcement of the "Interstate Wagering" provision (referred to at times as "the Amendment") of the "Violent Crime Control and Law Enforcement Act of 1994" (the "Crime Bill"), which was signed by President Clinton on September 13, 1994, and which was, in relevant part, effective

immediately upon such signature. Pic-A-State avers that the interstate wagering provision of the Crime Bill, attached hereto as Exhibit "A", is unconstitutional both on its face and as applied to Pic-A-State's business, the very business which said provision seeks to make criminal, *i.e.*, the facilitating of a person's desire to participate in a lottery conducted by a state other than that in which said person is present, because said provision violates the Commerce Clause, the First, Fifth, Ninth, Tenth, and Fourteenth Amendments of the U. S. Constitution, and further, because said provision is beyond the scope of the congressional authority and power under the U. S. Constitution; and, finally, said provision denies Pic-A-State due process of law because it is unconstitutionally vague and over broad. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331.

7. Pic-A-State believes and therefore avers that jurisdiction is also necessary and proper in the case under the principles set forth in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Pic-A-State intends to assert all colorable and cognizable claims based thereon in pursuing declaratory and preliminary and permanent injunctive relief concerning the constitutionality of the "Interstate Wagering" provision of the Crime Bill.

8. Venue is proper in this District under 28 U.S.C. § 1391(b) and § 1391(e).

BASIS OF ACTION

A. Operations of Pic-A-State

9. Pic-A-State has conducted a messenger business in the

Commonwealth of Pennsylvania through approximately one hundred and sixty-five (165) retail outlet locations. Engaging in this business is made a Federal criminal violation by the "Interstate Wagering" amendment to 18 U.S.C. § 1301. Contracted dealers act as order takers or agents for persons in Pennsylvania who desire to participate in officially legalized and authorized lotteries of states other than that conducted by Pennsylvania. The dealers' participation in this business arguably subjects them to the "Interstate Wagering" amendment to 18 U.S.C. § 1301. Pic-A-State has suspended operations as of September 14, 1994, until such time as this action could be filed, so as to avoid the possible enforcement by defendants of the Crime Bill provision against such operations. Because the "Interstate Wagering" provision was effective immediately, Pic-A-State is threatened immediately with actual injury, which injury is not conjectural.

10. Pic-A-State outlets consist of small retail or service businesses which pay Pic-A-State for the privilege of acting as a Pic-A-State outlet and thereafter receive a commission from Pic-A-State on their sales of orders transmitted for out of state lottery participation by customers.

11. Pic-A-State does not have any actual out of state lottery tickets at its retail outlets, nor do those outlets have direct electronic access to any out of state lottery ticket issuance computer facilities. In order to fulfill a customer's order for an out of state lottery ticket, Pic-A-State retail outlets must arrange for the ticket to be purchased in the foreign state by a Pic-AState agent in that foreign state. Absent the "Interstate Wagering" amendment to 18 U.S.C. § 1301, Pic-A-State's operations do not violate any Federal criminal laws.

12. Pic-A-State outlets deal with customers who are attracted by signs and other media, advertising opportunities for the customer to participate in legally authorized out of state lotteries, without having to travel physically to that state, and without having to contact a person in that state themselves to allow them to participate in that state's lottery.

13. The outlet accepts the customer's order and records it on a computer terminal supplied to the outlet by Pic-A-State. The entry identifies the out of state lottery involved, the number to be played as selected by the customer, or at the customer's option, by the Pic-A-State outlet's quick pick (computer generated) process, the date and other information. From the entry in the computer, the outlet generates a receipt printed by the computer, which the outlet gives to the customer as a record of the order.

14. Once the order is placed by the customer, the outlet transmits the information from its computer terminals to Pic-A-State purchasing agents. This transmission is intended to be made criminal by the "Interstate Wagering" amendment to 18 U.S.C. § 1301. Pic-A-State materials inform the customers that they are giving Pic-A-State and its purchasing agents powers of attorney to act as the customer's agent in placing orders in the other states.

15. The Pic-A-State purchasing agents in the other states purchase lottery tickets in accordance with the orders, directly from the other states' licensed lottery agents. The participation of these agents in this process arguably subjects them to prosecution under the "Interstate Wagering" amendment to 18 U.S.C. § 1301. Pic-A-State does not return the actual lottery ticket to the customer, but retains the ticket in a vault in the state of purchase on behalf of the ordering customer. The ticket is at all times available to the customer on his request.

16. Pic-A-State acts as an agent or contractor on behalf of bettors and players. Pic-A-State derives its profits not from the mathematical edge arranged by the state authorized lotteries, but from the fee paid by bettors to have Pic-A-State act as their messengers and service providers. Pic-A-State is not engaged in any gambling activity, nor are its customers, who are merely engaging in the pursuit of legal lottery tickets being offered for sale by sovereign states. All lottery tickets purchased by Pic-A-State for its customers are purchased in full compliance with the laws of the state issuing the ticket, and in full compliance with Federal, pre-Crime Bill, law.

B. Other Relevant Backqround Averments

17. On May 20, 1993, Pennsylvania Governor Robert Casey signed into law, Act 8, which would have become effective on July 19, 1993. Act 8 made a misdemeanor the activities of PicA-State described above, as the Act would have prohibited Pic-A-State from acting as a messenger or agent for those Pennsylvania citizens who desire to participate in out of state lotteries.

18. Act 8 was introduced, and eventually passed, in response to the Commonwealth's unsuccessful attempt, through the Office of Attorney General, to prosecute and enjoin Pic-A-State from all business in Pennsylvania, under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201.1 *et. seq.* (Purdon Supp. 1991), on the grounds that the operations of Pic-A-State were unlawful and violative of the Commonwealth's penal laws against conducting unlawful lotteries and federal laws prohibiting interstate transportation of gambling materials; said action was brought to Docket No. 218 M.D. 1991 in the Commonwealth Court of Pennsylvania.

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19. After an evidentiary hearing on the issues, the Commonwealth Court, by President Judge David W. Craig, issued an Opinion and Order dated August 19, 1991, wherein the Commonwealth's request for a preliminary injunction was denied. Judge Craig found that Pic-A-State's business operations were not in violation of the state's existing criminal statutes, the state's consumer protection statute, or federal law.

20. The Commonwealth Court's decision was affirmed, without opinion, by the Pennsylvania Supreme Court on May 6, 1992, and the Commonwealth took no further action in state court with respect to its attempts to shield its lottery operation from competition by putting Pic-A-State out of business, switching instead to introducing and passing Act 8 to attempt to achieve that purpose.

21. The Commonwealth, therefore, faced with an inability to exclude competition for the Pennsylvania Lottery under the existing laws of the Commonwealth, sought specifically to craft a new law for the sole purpose of destroying Pic-A-State's business operations by making all persons associated therewith subject to criminal prosecution if Pic-A-State's operations continue after the effective date of Act 8.

22. Act 8, in its attempt to drive Pic-A-State out of business in the Commonwealth, was determined by this Court to violate the Commerce Clause, in the matter *Pic-A-State PA, Inc. et al v. Commw. of Pennsylvania*, 1:CV-93-0814 [Orders of July 23, 1993, and December 29, 1993, per Rambo, C.J. both attached as Exhibits "B" and "C" hereto]. Said Orders are currently on appeal in the United States Court of Appeals for the Third Circuit, No. 94-7056, which appeal was argued on September 14, 1994, the day after the President signed the Crime Bill.

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C. The Interstate Wagering Amendment is Unconstitutional.

23. The Crime Bill provision governing "Interstate Wagering," which amends 18 U.S.C. § 1301 is unconstitutional because it:

(a) impermissibly interferes with interstate commerce by prohibiting Pic-A-State's facilitating the right of all citizens to participate in a state lottery of their choice, and by prohibiting persons from acting as agents or messengers to achieve that result, which prohibition violates the Commerce Clause by placing an undue, illegitimate and unjustified burden on interstate commerce, which burden is beyond the power of Congress under the Commerce Clause, by reason of the limitations placed thereon by the Ninth and Tenth Amendments of the Constitution;

(b) impermissibly furthers the states' monopolies on their own lottery products by prohibiting competition from other states' lotteries, as achieved through Pic-A-State's operations, in violation of the federal antitrust laws, which are the supreme law of the land with respect to competition in interstate commerce. Congress has no power under the Commerce Clause or any other provision of the Constitution to enact laws, the effect of which is both to grant to states monopoly power which violates the Antitrust Laws and to prevent consumers from enjoying the availability of legal lottery products;

(c) impermissibly denies Pic-A-State, Scott McLean, and their customers due process of law by taking away the opportunity of all persons to exercise a free choice as to which state lottery they wish to play, by unduly restricting

and virtually eliminating a person's ability to participate in anything other than the lottery offered by the lottery monopoly conducted by the state in which he or she lives;

(d) impermissibly abrogates and impinges upon Pic-A-State's rights to free speech under the First Amendment; and

(f) was enacted in such a way as to deny Plaintiffs due process of law as guaranteed by the Constitution in that the reason set forth by Congress in enacting this Amendment to 18 U.S.C. § 1301 are not proper justifications for Congress' exercise of its power under the Commerce Clause, as constrained by the Ninth and Tenth Amendments, and further because Congress enacted said provision without hearings, testimony, data or other investigation of the effect of Pic-A-State or any similar business on any state lottery, with such legislation resulting instead from an improper effort of the Congress to protect the parochial interests of Pennsylvania,, and not the nation;

(g) the Amendment to 18 U.S.C. § 1301 is unconstitutionally vague and overbroad and denies Pic-A-State due process of law under the Fifth Amendment;

(h) the Amendment to 18 U.S.C. § 1301 is inconsistent with, and, in fact, made irrelevant and of no force and effect, by virtue of 18 U.S.C. § 1307.

24. The "Interstate Wagering" provision of the Crime Bill also violates the Commerce Clause of the United States Constitution in the following manner:

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(a) the Amendment is discriminatory and unconstitutional because its sole purpose and goal is economic protectionism, *i.e.*, to protect all state lotteries from competition by prohibiting people who wish to participate in an out of state lottery from doing so by using Pic-A-State as their messenger or agent to facilitate such participation;

(b) the Amendment's only purpose is to discriminate against articles of interstate commerce by banning competition from other states' lotteries, without any substantial, legitimate or justifiable reason to treat them differently, other than their origin in a foreign state;

(c) the Amendment violates the Ninth and Tenth Amendments;

(d) the effect of Pic-A-State's activities on interstate commerce are trivial at best and not of the substantial magnitude necessary to justify congressional action pursuant to the Commerce Clause;

(e) there are less restrictive alternatives to the Amendment which would nevertheless accomplish its purpose without a complete ban and criminalization of the conduct engaged in by Pic-AState;

(f) the Amendment grants to the several States insular lottery monopolies, which monopolies are illegal under the Antitrust Laws because while states may be free to conduct the only legal lotteries in intrastate commerce, Congress is without authority to expand intrastate monopolies into interstate channels;

(g) it is incongruous for Congress to assert that the mere authorization of the otherwise prohibited business by states makes the conduct noncriminal for purposes of interstate commerce and the purported National interest, if any, which Congress seeks to protect.

25. Allowing the Amendment to remain effective and be enforced prior to adjudication of the merits of this case will cause Pic-A-State to suffer extreme hardship and actual and impending irreparable harm and loss, as it will force Pic-AState out of business unless Pic-A-State, its outlets and other agents, are willing to risk arrest, prosecution, fines and possible incarceration by continuing their business operations. A stay of the Amendment until adjudication of the merits of this matter is the only way to protect Pic-A-State from the threat of arrest and prosecution and from the irreparable harm to be suffered if their business activities must cease.

26. Pic-A-State has no adequate or effective remedy at law, and this action for injunctive and declaratory relief is the only means for securing relief.

D. *The Interstate Wagering Amendment Grants States Illegal Monopoly Power.*

27. The Amendment is unconstitutional as Congress has no ability, authority or power under the Constitution to pass laws aimed at furthering all or any states' parochial and proprietary interests by protecting the state lotteries at the expense of violating 15 U.S.C. § 2 which prohibits the monopolization of trade among the states; or by

(a) discriminating against out of state interests for

reasons based only on such interests' geographic origin, a practice prohibited by the Commerce Clause of the United States Constitution as constrained by the Ninth and Tenth Amendments;

(b) establishing such a monopolistic policy, which is in direct conflict with 15 U.S.C. § 2, which may not be legitimized under the guise of any state action immunity, because the States which conduct lotteries are market participants, and are not entitled to the protection of state action immunity for violating the Sherman Act.

28. Allowing the Amendment to become effective and be enforced prior to adjudication of the merits of this case will cause Pic-A-State to suffer extreme hardship and actual and impending irreparable harm and loss, as it will force Pic-A-State out of business unless Pic-A-State, its outlets and other agents are willing to risk arrest, prosecution, fines or possible incarceration by continuing their business operations. A stay of the Amendment until adjudication of the merits of this matter is the only way to protect Pic-A-State form the threat of arrest and prosecution.

29. Pic-A-State has no adequate or effective remedy at law, and this action for injunctive and declaratory relief is the only means for securing relief.

E. *The Interstate Waqering Amendment Violates the First Amendment.*

30. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. 1.

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31. Pic-A-State advertises its business of facilitating participation by its customers in out of state lottery operations.

32. The Amendment prohibits Pic-A-State's advertising by making it a crime, because it prohibits being in the business that Pic-A-State is in.

33. Advertisement of Pic-A-State's business of facilitating its customers' purchase of out of state lottery tickets constitutes commercial speech in that through such commercial speech a commercial transaction is being proposed.

34. Pic-A-State's advertising, which constitutes commercial speech, is entitled to First Amendment protection because it concerns lawful activity and is not misleading or fraudulent.

35. The purpose of the Amendment cannot be the protection of its citizens from the potential harms of participating in a lottery, because states, in fact, *promote* participation in lottery gambling by their citizens, through their aggressive advertising and, other inducements to encourage the playing of all lotteries. The sole purpose of the Amendment is merely to prohibit United States citizens from participating in out of state lotteries through their use of the services offered by Pic-A-State, despite the fact that, *e.g.*, any person could still, despite the provisions of the Amendment, call a resident in another state, or travel thereto, so as to participate in that state's lottery. The only thing that is a crime is being in the business and transmitting the information — transmitting the information and not being in the business is not a crime.

36. There is no substantial National interest in prohibiting

people from participating in an out of state lottery, when the underlying basis of all Lottery Laws is specifically to permit people to participate in one lottery, their state lottery; furthermore, the Amendment demonstrates that the United States of America is willing to let its citizens participate in out of stte lotteries on one condition — if agreed to by the States on either end of the transaction. Thus, it is clear that the sole purpose of the Amendment is to preclude private enterprise from doing so, so as to "protect" state lotteries, by preventing all competition so as to allegedly guard all revenues thereof, which motive and intent is not a proper one for this type of congressional action, as limited by the Ninth and Tenth Amendments.

37. The Amendment is more extensive than is necessary to serve any interest of any State or the National interest in protecting citizens from fraudulent and/or unfair trade practices, or ciminal activities regarding State sanctioned lotteries.

38. States presently have adequate statutory common law and criminal law remedies available to protect their residents from any injuries resulting from fraudulent and/or deceptive trade practices from Pic-A-State activities or the activities of any out of state lottery service business.

39. The Amendment violates Pic-A-State's First Amend-ment right of free speech.

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RELIEF SOUGHT

WHEREFORE, Pic-a-State respectfully requests that this Court:

(1) issue a stay of the implementation of the "Interstate Wagering" provision of the Crime Bill amendment to 18 U.S.C. § 1301, pending further action on the merits of this case; and

(2) (i) issue a preliminary and permanent injunction pursuant to Federal Rule of Civil Procedure 65, prohibiting the Amendment from becoming enforced and being enforced specifically against Pic-A-State's operations, and ordering the defendants and all of their agencies, officers, agents, employees, officials, attorneys and all those in active concert or participation with them, to refrain immediately, and pending the final determination of the merits of this case, from enforcing the Amendment as against Pic-A-State operations; and (ii) issue a declaratory judgment that the Amendment is unconstitutional either on its face and/or as applied to Pic-A-State operations as being beyond the powers of Congress as set forth herein; and

(3) award plaintiff attorney fees and costs and such other and further relief as this Court may deem just and proper.

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Respectfully submitted,
GOLDBERG, KATZMAN & SHIPMAN, P. C.

By: s/ Michael A. Finio
Michael A. Finio, Esquire
Attorney I.D. No. 38872
320 Market Street
Strawberry Square
P.O. Box 1268
Harrisburg, PA 17108-1268
(717) 234-4161

Attorneys for Plaintiffs,
Pic-a-State PA, Inc. and
Scott McLean

DATED: September 16, 1994

BEST AVAILAB

APPENDIX I — *INTERNATIONAL GAMING & WAGERING BUSINESS*, VOL. 14, NO. 12 (DEC. 15, 1993)

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Appendix 1

LOTTERY BEAT
By Matt Connor and Paul Doocey

Do ticket resellers take money away from in-state sales

If it had been the Pennsylvania Lottery's intention to surprise Pic-A-State—the lottery ticket reseller based in Harrisburg, Pa. — with national legislation banning the sales of out-of-state lottery tickets, then the organization succeeded beyond its wildest dreams.

According to a source familiar with the company, officials at Pic-A-State did not learn about the anti-ticket reselling amendment attached to the National Crime Bill by Pennsylvania's U.S. senators **Arlen Specter** and **Harris Wofford** until a day before it was introduced into the Senate — much too late to really do anything about it. If all goes as planned, the bill will be ready for President **Bill Clinton** before the end of November and signed into law before the end of the year.

But Pennsylvania was not alone in fomenting and springing this surprise on Pic-A-State. The National Association of State & Provincial Lotteries (NASPL) played an integral behind-the-scenes part in making sure everything with the amendment passed without a hitch. According to **William Bergman,** executive director for NASPL, members of the organization first heard about the Pennsylvania Lottery's plans during their annual meeting held in Calgary this past September. Essentially, they were informed of what Pennsylvania intended to do and asked to participate in the lottery effort that would be needed. For their part, members made certain the legislation would not affect the Multi-State Lottery Corp., or any other cooperative lottery ventures between states.

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Perhaps NASPL's biggest accomplishment in the whole process was its aid in keeping the amendment very, very quiet. "Basically, we did not want Pic-A-State to know about it until the U.S. Marshall was knocking on their door to serve them papers."

But the Pennsylvania Lottery/NASPL action against Pic-A-State is not a done deal just yet. As it currently stands, the amendment outlawing ticket resellers is written into only the Senate version of the crime bill. The amendment must be brought into whatever compromise version of the bill the House and the Senate produce to become law.

Officials for Pic-A-State are not giving up without a fight either. Currently, they are calling for an independent audit of the Pennsylvania Lottery. They hope the audit will show Pennsylvania lottery ticket sales were not hurt by their activities for the state, making the charge in the amendment — that ticket resellers take money away from in-state ticket sales — groundless.

* * *

Appendix 1

93 NEWSMAKERS

The history makers of 1993

★ Pic-A-State ★

What does Scott McLean, president and chief executive officer of Pic-A-State, have in common with a Serbian anarchist from the turn of the century?

Well, if you remember your high school history, it was a Serbian anarchist who fired the shot that killed the Archduke of Austria in 1914. This one act set off a series of reactions that ended up becoming World War I, the event historians often credit with destroying the Old World and ushering in the Modern Age.

Although not as dramatic or bloody, McLean and his company have precipitated an act that could change the lottery universe as we know it. This past summer, they convinced a federal judge in Harrisburg, Pa., to overrule a lower court decision banning the sale of out-of-state lottery tickets in Pennsylvania. The end result: The right for Pic-A-State to operate in the state and a precedent that could eventually end state control of lotteries.

"I'll tell you what concerns me," said Jeff Purlee, general consul for the Illinois State Lottery when the Pic-A-State decision was made this past summer. "This decision gets to the very heart of state sovereignty over lotteries. The grounds the company used to attack the state could conceivably be used to form the basis for a national-type lottery."

Changing the lottery world was the last thing McLean had in

mind when he formed Pic-A-State in 1989. Originally in the insurance and real estate industries, McLean started a Pic-A-State after reading about a lottery ticket reseller trying to make a go of it in Virginia. "We took the idea and ran with it, expanded it, made it better," he said.

What Pic-A-State does is offer out-of-state lottery tickets to a customer in a state through its own network of terminals in retail outlets. The terminals produce a receipt for the customer as his proof of purchase. This service costs the customer an additional dollar on top of the ticket price — a 25-cent commission for the retailer and 75-cent profit to Pic-A-State.

Indeed, unlike earlier reseller efforts, Pic-A-State expanded the business to offer lottery products from multiple states. Refinements in the business came through the emphasis of providing service instead of strictly reselling tickets — according to McLean, federal laws allow his company to provide lottery tickets as a service to customers, and charge a fee for that service.

McLean also discovered through market testing customers were willing to accept a paper guarantee of ticket purchase instead of the actual ticket, allowing the company to avoid "gray areas" in the law such as the transporting of lottery tickets across state lines.

But it is in court that the company has made its biggest splash. Lotteries have traditionally protected their monopolies by enacting new laws and bringing ticket resellers to state court. The states of New Jersey, New York, Connecticut, Florida and New Jersey all brought resellers to court and won decisions forcing them to cease operation in the state. In Pennsylvania,

however, a federal judge ruled the state court did not have the right to ban out-of-state ticket sales, saying such an act violated federal laws regarding interstate commerce.

This decision has emboldened the company, which is rumored to be considering expansion in New York, California, Ohio and Illinois.

* * *

Editor's note: As of press time, an ammendment to the National Crime Bill could spell serious trouble for Pic-A-State. For details, see story p. 4.

APPENDIX J — 139 CONG. REC. S15246-48 (DAILY ED. NOVEMBER 8, 1993)

* * *

I see my friend from Pennsylvania seeking recognition. I will be happy to yield for a question. I do not want to yield the floor in the event my friend may have an amendment that does not fall into one of those categories at this point.

Does the Senator have a question?

Mr. SPECTER, I do have a question.

Will the Senator from Delaware yield for the introduction of an amendment that has been agreed to, the so-called lottery amendment which the Senator wanted to handle last Friday.

Mr. BIDEN. I would be delighted to. I believe we have reached agreement on both sides on this amendment.

I would be delighted to yield to my friend from Pennsylvania for that purpose.

The PRESIDING OFFICER. The Senator from Pennsylvania.

AMENDMENT NO. 1113

(Purpose: To amend section 1301 of title 18, United States Code, to make unlawful the transmission in interstate or foreign commerce of information to be used for the purpose of procuring an interest in a lottery ticket)

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Mr. SPECTER. Mr. President, I call up amendment No. 1113 on behalf of myself and Senator WOFFORD.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

> The Senator from Pennsylvania [Mr. SPECTER], for himself and Mr. WOFFORD, proposes an amendment numbered 1113.

Mr. SPECTER. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection it is so ordered.

The amendment is as follows:

> At the end of subtitle G of title XXIX, add the following:
>
> SEC. 1972. INTERSTATE WAGERING.
>
> Section 1301 of title 18, United States Code, is amended by inserting "or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise, or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States),

knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest;" after "scheme;".

Mr. SPECTER. Mr. President, this amendment would prohibit transactions in which interests in out-of-State lottery tickets are purchased by a person in the purchaser's home State, which means that under this amendment someone in Pennsylvania could not buy an interest in an out-of-State lottery ticket which is transmitted by electronic means.

The amendment would close a loophole which has undermined the Pennsylvania lottery and its providing of funds for senior citizens.

The situation arose in July of this year, Mr. President, when a Federal court in Harrisburg struck down a Pennsylvania law which prohibited the sale of an interest in out-of-State lottery tickets — that is non-Pennsylvania tickets — which were sold in Pennsylvania. That means that somebody in Pennsylvania could buy an interest, hypothetically, in a lottery ticket in California.

A Federal judge found that the Federal law did not prohibit the sale of an interest in out-of-State lottery tickets, based really on a technicality. Although current law does prohibit the interstate transportation of the lottery ticket and would appear on its face to restrict all sales of lottery tickets across State lines, the development of communication technology resulted in this loophole in the Federal lottery law. Transactions of the sale and interest in out-of-State lottery tickets by persons via computer communications, where no paper crosses State lines, are legal under this strict interpretation of the law.

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Pennsylvania's interests in promoting its lottery have been infringed and State officials in Pennsylvania believe that the State must have the exclusive right to sell lottery tickets within its own borders.

The issue of a lottery is highly controversial, Mr. President. Candidly, I have always had substantial reservations about it, but that has been the law of Pennsylvania for more than 20 years the Pennsylvania lottery proceeds, under the laws of my State, have been dedicated for very worthwhile programs to benefit senior citizens, although, as I say, there has always been a question in my mind as to the desirability of taking the funds from gamblers.

The issue of senior citizens was put into sharp focus by a letter from Mr. Harvey Portner, chairperson of the Pennsylvania Council on Aging, dated October 18, 1993, which reads as follows:

> DEAR SENATOR SPECTER: As you know, Pennsylvania is the only state in the country in which our lottery dollars are one-hundred percent dedicated to the needs of older people. Only 16 percent of the Department of Aging's budget is federal.
>
> Lottery supported programs of the Pharmaceutical Assistance Contract for the Elderly (PACE), Shared Ride transportation, Property Tax and Rent Rebates, senior centers, and the OPTIONS programs which enables older people to live in their homes rather than in nursing homes — are all funded by the lottery. Over one million people every

year benefit from some service offered by our Commonwealth.

Mr. President, that is the essential statement of the purpose by the senior citizens. I ask unanimous consent that the full text of this letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

PENNSYLVANIA COUNCIL ON AGING,

Harrisburg, PA. October 18, 1993.

HON. ARLEN SPECTER,

Member, U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATOR SPECTER: As you know, Pennsylvania is the only state in the country in which our lottery dollars are one-hundred percent dedicated to the needs of older people. Only 16 percent of the Department of Aging's budget is federal.

Lottery supported programs of the Pharmaceutical Assistance Contract for the Elderly (PACE), Share Ride transportation, Property Tax and Rent Rebates, senior centers, and the OPTIONS programs which enables older people to live in their homes rather than in nursing homes — are all funded

by the lottery. Over one million people every year benefit from some service offered by our Commonwealth.

For these reasons, the PA Council on Aging is gravely concerned over a court decision in Pennsylvania that over turned a recently passed state law (Oct. 8, 1993) that would have banned out-of-state lottery sales. These types of sales have a direct and negative impact on Pennsylvania lottery sales. The final result will be revenue losses for programs that assist very vulnerable older citizens of Pennsylvania.

We understand that you are exploring Congressional action that could prevent the out-of-state ticket sales in Pennsylvania. We urge your immediate and full support of such a legislative remedy.

Thank you for your consideration on this very important matter.

Sincerely,

HARVEY PORTNER,
Chairperson.

Mr.SPECTER. Mr. President, current law prohibiting interstate transfer of lottery tickets is designed to protect the sovereignty of State lottery programs. However, due to advances in communication technologies, current law does not

accomplish its intended goals. This amendment is designed to uphold the intent of that law by preserving a State's right to sell its own lottery tickets within its borders and exclude the sale of other States' tickets.

A recent Federal court decision struck down a Pennsylvania law to prohibit the sale of an interest in out-of-State lottery tickets in Pennsylvania. This decision was based on a strict interpretation of the law which, I believe, is in urgent need of updating. Current law does prohibit the interstate transportation "of any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in * * * a lottery." Although this provision of law would appear to restrict the interstate sale of a lottery ticket or any interest in a lottery ticket, the subsequent development of communication technology has resulted in a loop hole that allows for the circumvention of the law.

The transactions of concern to Pennsylvania are the sale of interests in out-of-State lottery tickets via computer transaction with no paper crossing State lines. The judicial interpretation of the law concluded that transactions of this nature are allowed under a strict interpretation of the law.

It is my belief that current Federal gambling laws clearly intend to prohibit this type of activity. Therefore, today I am offering this amendment to prohibit the engagement of business transactions in which interests in out-of-State lottery tickets are purchased for a person in the purchaser's home State.

The situation in Pennsylvania is not unique. Other States which have lottery programs are concerned that the sale of out-of-State lottery tickets will undermine their ability to realize

projected revenues for valued State programs. State lottery programs are based on the premise that the revenues derived from the lottery go toward State programs for the betterment of that particular State. Any erosion of revenues due to the sale of out-of-State lottery tickets is contrary to the purpose of State lottery programs.

Further, the right of a State to regulate lottery and gambling within its borders must be preserved. Federal gambling laws have traditionally enabled States to regulate in-State gambling. Federal laws should continue to limit the proliferation of interstate gambling to preserve the sovereignty of States that do not permit certain forms of gambling.

Mr. President, a State's right to conduct State lotteries and regulate in-State gambling. Federal laws should continue to limit the proliferation of interstate gambling to preserve the sovereignty of States that do not permit certain forms of gambling.

Mr. President, a State's right to conduct State lotteries and regulate gambling within its own borders must be preserved. Accordingly, I urge my colleagues to support the amendment.

Mr. WOFFORD. Mr. President, I am pleased to offer this amendment with the senior Senator from Pennsylvania. This amendment is needed to update the existing Federal criminal statutes to reflect modern advancements in telecommunication and computer technology that have overtaken existing prohibitions.

States have historically had the authority to establish, operate, and regulate lotteries within their borders. But new

technologies are undermining that historic right. Pennsylvania, like many other States, has worked hard over the past 21 years to maintain the integrity of its lottery. As a result, our lottery receipts have grossed $1.5 billion this year with over $800 million going toward senior citizens programs.

However, the Pennsylvania lottery is threatened today by a scheme under which out-of-State lotteries are in effect able to market and sell their lottery tickets in Pennsylvania. These schemes, which plainly violate the spirit and intent of the Federal law, are allowable because of a loophole in the current law.

The purpose of the amendment we are offering today is to close this loophole by updating the law to preserve States historic ability to regulate lotteries.

I am pleased that this amendment has been cleared on both sides. I thank and commend my colleague from Pennsylvania for his work on this issue. And I thank the Chair and ranking member of the Judiciary Committee for working with us to accept this amendment.

Mr. BIDEN. Mr. President, currently, Federal law prohibits the sale of lottery tickets across State lines. However, a loophole exists that allows the sale of a receipt, instead of a ticket, for a lottery located in another State.

A recent Federal court case in Pennsylvania overturned a Pennsylvania law that attempted to close this loophole.

Not only is the loophole contrary to congressional intent to prohibit interstate gambling operations, but it hurts the operation of lotteries in the smaller States, like Delaware.

Appendix J

The Governor of Delaware, Thomas Carper, wrote to me in support of this amendment.

His letter noted that the Delaware State lottery added $29 million to the State treasury last year. These funds are a significant contribution to the State treasury.

This amendment will prevent the negative impact on lottery sales in small States the loophole entails and maintains those lotteries as important sources of revenue.

I ask unanimous consent that the text of the letter from the Governor of the State of Delaware, Gov. Tom Carper, supporting this amendment be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

STATE OF DELAWARE,
OFFICE OF THE GOVERNOR.

Dover, DE, October 29, 1993.

Hon. JOSEPH R. BIDEN,
Russell Senate Office Building,
Washington, DC.

DEAR JOE: I would like to take this opportunity to bring to your attention an amendment which may be offered to the crime package by Senators Wofford and Specter prohibiting the sale of out-of-state lottery tickets, and to make you aware of its beneficial impact on Delaware's state lottery.

Appendix J

As you are aware, current federal gambling law prohibits the transportation of state lottery tickets across state lines. While this statute was intended to prevent sales of out-of-state lottery tickets, a small company in New Jersey, Pic-A-State with over 160 offices in Pennsylvania, has circumvented federal law by selling receipts, instead of tickets, for large state lotteries outside of Pennsylvania. This issue has been the subject of a several year dispute between Pic-A-State and Pennsylvania state officials, who believe it has adversely affected state lottery revenues.

In July, the U.S. District Court in Pennsylvania struck down Pennsylvania's law which bans the sale of out-of-state lottery tickets. The Wofford/Specter amendment would in effect overturn this decision by amending federal interstate gambling law to prohibit the sale of out-of-state lottery tickets. As the court's decision has the potential to negatively affect state revenues from lottery ticket sales, especially for smaller states, this amendment is supported by the National Association of State and Provincial Lotteries.

Should Pic-A-State and other companies which may form as a result of the recent U.S. District Court decision moved into Delaware, I am concerned about the potential adverse financial impact on Delaware's

revenues from state lottery ticket sales. Last year, Delaware's lottery contributed $29 million to the state's general fund.

I hope that you will keep these issues in mind during your deliberations on the crime bill. Again, I appreciate the opportunity to share my thoughts with you.

Sincerely,

TOM CARPER,
Governor.

Mr. HATCH. Mr. President, I want to again compliment the distinguished Senator from Pennsylvania. It is a good amendment and, as usual, it is a very thoughtful one. The distinguished Senator from Pennsylvania knows as much about these subjects as anybody on the floor or anybody in the whole Congress. We appreciate having his advice and counsel on this and certainly we are prepared to accept the amendment.

The PRESIDING OFFICER. If there is no further debate, the question is on agreeing to the amendment offered by the Senator from Pennsylvania.

The Amendment (No. 1113) was agreed.

Mr. SPECTER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. BIDEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Appendix J

Mr. BIDEN. Mr. President, I am about to propose a unanimous-consent request and then, after I do that, ask by unanimous consent we yield to the Senator from New Jersey for 10 minutes on an unrelated matter.

Mr. President, I ask unanimous consent that we proceed to debate on the Smith amendment on alien terrorists with 1 hour for debate equally divided and controlled in the usual form with a vote to occur on or in relation to the Smith amendment upon the use or yielding back of time, and no other amendments be in order prior to the disposition of the Smith amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BIDEN. Mr. President, I now ask unanimous consent that we put the Smith amendment aside without any time being charged to it for a period of 10 minutes to yield to the Senator from New Jersey on an unrelated matter.

I might say that through the generosity of the Senator from New Hampshire we are doing this because, as I told the Senator from New Jersey, what he has to speak to is very important. But I would discourage those who have speeches on unrelated matters, matters unrelated to the crime bill, from coming to the floor because it will not be my intention to yield on any matter other than that related to the crime bill so we can get amendments up, ordered, and move along. But I am delighted to yield now, and I ask unanimous consent I be permitted to yield to the Senator from New Jersey.

The PRESIDING OFFICER. Senator from New Jersey is recognized for 10 minutes.

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